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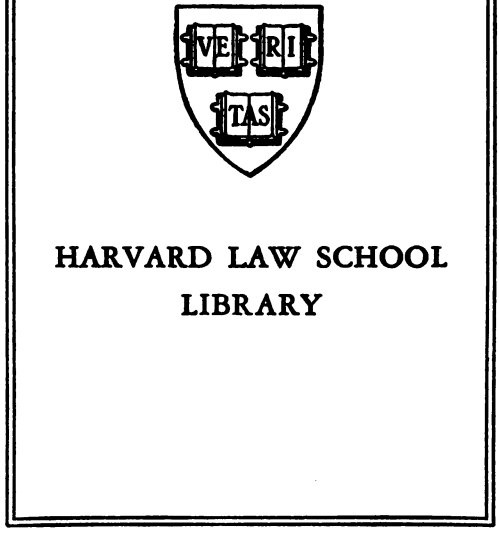

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Domestic Relations — Wrongs

including Property Rights of Husband and Wife; Parents and Children; Guardianship; The Rights and Liabilities of Employers and Employees; Assaults, Slander and Libel; Nuisance, and Trespass

By

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CHAPTER XI (*Continued*)

MARRIAGE (*Cont.*)

§ 3. RIGHTS OF PROPERTY

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1. Leaving for the present the legal aspect of wrongs between husband and wife and also between them and other persons, we approach the subject of a husband's right to the property of his wife. Formerly, he was responsible for all her debts contracted before her marriage, as well as afterward; on the other hand, the law kindly relieved her of all her property. In other words, he took everything she had and became responsible for all her bills.

2. In many states the husband was declared to be

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the agent to care for and manage her property, to bring suit, if need be, for the protection or recovery thereof. In short, the law converted him into an official protector and helper in the preservation and enjoyment of her property. Within a century the greatest changes have been wrought by statute with respect to the ownership and management of her property. These, as we shall now see, have been in the way of rendering her more independent of her husband's control and management. These statutes encountered much opposition, many believing that if a wife were thus given the right to retain and manage her property her independence would lead to unhappiness and quarrels. Truly the love of money has too often burnt out personal affection.

3. With advancing years all legislation on this subject has uniformly run in the way of freeing a married woman from her husband's control in owning, using, and managing her property, both real and personal. Whatever may have been the unhappy results flowing from these changes, the good results have been far greater; indeed, they have been so marked everywhere that this legislation has been coursing onward in a broadening and deepening stream until in many states a married woman can manage, own, and dispose of her property almost as effectively as her unmarried sisters.

4. As a legislature has no authority to change, modify or abolish estates of any kind, it cannot divest anyone of his rights acquired by marriage. Every statute therefore of that nature taking away or im-

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paring a vested right is retrospective and opposed to the most general principles of jurisprudence.

A statute relating to future acquisitions of property by married women is constitutional. A state therefore can enact that all property thereafter acquired, or coming to a married woman shall be her separate estate, free from the control of her husband or liability for his debts.

A legislature has power to secure to a deserted wife the right and privileges of a married woman who is a sole trader, and may also confer on her the unqualified right to dispose of her own property, real and personal, unencumbered by her husband's curtesy.

Finally, a legislature has authority to render the property of a married woman liable for family expenses, for debtors have no vested rights to escape from the payment of their debts.

5. We shall now proceed to describe the more important changes in the law relating to the property of married women. A long time ago equity made a wide departure, permitting her to retain the ownership, control, and income of her real estate devised or given to her with the intent and purpose that it should remain her own property. These bequests the courts have never ceased to execute.

6. To this end she may, without her husband's consent, contract for the repair of her real estate, or for labour and materials to improve and cultivate it. Should a dispute arise concerning an improvement, it must appear that the contract was for the benefit of her separate property.

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In some states a married woman may make valid contracts concerning her real and personal estate after abandonment by her husband, or their separation, or after a visitation of insanity incapacitating him for effective action.[1]

7. Once by the common law a married woman could not make any kind of a contract with her husband, but in some states this prohibition has been modified by statute. In Nevada either husband or wife may contract with respect to property as if they were unmarried, subject to the same rules that apply to other persons in similar transactions. In Minnesota this principle applies to every other thing than real estate. In Alabama they make contracts subject to the same rules as apply to other persons with the single limitation that neither can become security for the other. In Pennsylvania a married woman may lend money to her husband and take a judgment or mortgage as security in the name of a trustee. On the other hand, in Massachusetts she cannot make contracts with her husband, thus maintaining the old rule that the two persons are in law only one and therefore incapable of contracting with each other.

Where a husband and wife may contract with each other, as if unmarried, a court of equity will inquire whether the contract was fair and just and administer relief should the contract and circumstances require it, but a court will not entertain jurisdiction to enforce voluntary agreements not founded on a favourable consideration, either in favour of the wife against the hus-

[1] See Sec. 17.

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band, or in his favour against her. But their contracts which are fair and just, and have been executed, a court of equity will uphold save so far as they conflict with the just rights of creditors.

8. Such a contract may relate to the cultivation of her separate estate by her husband. And in doing so she does not divest herself of the legal title to the products, or run the risk of having them taken by his creditors. They cannot take them simply because the labour of her husband and children entered into them.

Nor can a husband testify against his wife for the purpose of proving a contract between them to pay for his services, if the statute does not permit the husband to disclose any communication made by him to his wife during their married life, except in trials for divorce.

9. A wife may maintain an action of ejectment against her husband to recover the possession of lands belonging to her. The fact that they were at one time homestead lands, or that the husband and children still reside thereon, does not impair her right of recovery. Again, a wife who has separated from her husband, leaving her separate estate in his possession, is entitled to recover it from him as if she were a stranger.

10. A conveyance by a husband to a wife without a valuable consideration is fraudulent as against his creditors. In other words, all transfers of property between a husband and wife whereby creditors are to suffer are invalid. In all cases wherein the rights of

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creditors or purchasers in good faith are in question the husband is regarded as having notice of the contracts and debts of his wife, and vice versa. Should a conflict arise between her husband's creditors for property claimed by her as her separate estate, she must prove that she paid for the same with money or other means of her own.

11. In many states she may also constitute her husband her attorney or agent for many purposes. By common law she could not appoint an attorney even to plead for her; by statute, enacted quite generally, the disability has been removed.

(*a*) Her power of attorney authorising him to sell land does not authorise him to use or dedicate any portion for a street; nor to sell her community interest in his land. But a general power to him to sign her name to all conveyances of real estate in which she has an interest will not be limited to a conveyance of her dower interest; it will empower him to convey all the right and interest in the real estate described, or land afterward acquired, before its revocation.

(*b*) In a power of attorney to convey land it need not be described in detail. Again, when the evident purpose of the power is to enable the attorney to control and convey land obtained after its execution, this construction will be given to the instrument.

(*c*) Authority to perform a specific act given in a power of attorney, containing also general words, is limited to the particular act authorised; in effect therefore the general words have no meaning. Says Justice Field: "Undoubtedly it is a rule that a special power

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of attorney is to be strictly construed, so as to sanction only such acts as are clearly within its terms, but it is also a rule of equal potency that the object of the parties is always to be kept in view, and where the language used will permit, that construction should be adopted which will carry out, instead of defeating, the purpose of the appointment." [1] Where the object, therefore, and sole object, of the power is to one particular thing, though it may contain general words referring to other matters, these have but little or no purpose.

12. A power of attorney need not be executed in the presence of the officer who took the acknowledgment, nor need he know that the signature was written by the grantor. If the grantor acknowledges before the officer the due execution of the instrument, he recognises and adopts the signature as his own.

13. The marriage of a woman revokes any power of attorney she may have previously given, and should he afterward execute a deed it would convey no title. But the rule is otherwise if the attorney has an interest of his own in the land. Nor does an unmarried woman who has given a power of attorney to confess judgment on her bond, by marrying, thereby revoke her power.

14. The general rule in conveying a homestead is that it cannot be conveyed unless both husband and wife join in the deed. Nor can either one of them, or both, by a mutual conveyance confer on the other the power to convey the homestead by a sole deed. Furthermore, a power of attorney given by a wife to

[1] Holliday v. Daily, 19 Wall.. 610.

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her husband to sign deeds and mortgages, etc., but not describing any real estate, or referring in any way to their homestead is too indefinite to authorise him to execute a mortgage on the homestead signed by him for himself and as attorney in fact for her. A mortgage thus executed is void.

15. An understanding between a husband and his wife that she will invest her money in goods to be bought and sold by him as her agent, whether known to the seller or not, is effective between the pair to make the purchase her own and to vest in her the title to the goods.

A husband may, as agent of his wife, contract for erecting any building or improvement on her land and will bind her, especially by her ratification of his conduct during the progress of the work. But when he contracts in his own name for improvements on her land, she cannot be held personally therefor, nor can a lien be maintained thereon.

Again, though a husband may thus act as his wife's agent, his authority to do so is never implied from the marital relation alone, nor from the mere fact that he occupies, manages and controls her real estate.

16. In some states all property acquired after marriage by either husband or wife is community property except that acquired by gift, bequest, devise or descent.[1]

(*a*) The essential idea is that marriage creates a partnership in property between husband and wife,

[1] Money deposited in a bank by a wife in her own name which falls after her death into the hands of her administrator, and is claimed by her husband as community property, he can recover.

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and that all property resulting from the labour of either or both, and all property vesting in both, except in ways that are mentioned by statute, shall be for their mutual benefit. In many respects it has the incidents of partnership property. This is the law in Louisiana, Texas, California and some other states in which the old Spanish law forms a part of the basis of the common law of the people, for by that law this system of common ownership of property existed. Indeed, community property has its source in the civil law and is therefore of ancient origin.

(*b*) Whatever is acquired by their joint efforts is regarded their common property. The fact need not be proved that the property in all cases is the product of their joint efforts. The law presumes that whatever is acquired, except by gift, devise or descent, or by the exchange of one kind of property for another, is acquired by their mutual industry.

(*c*) Realty acquired during marriage by purchase, whether the deed be taken in the name of the husband or wife, or in their joint names, will be presumed to be community property. Of course, the fact of acquiring it by purchase precludes the supposition of a gift, devise or title by descent. The presumption that a deed to a husband is a conveyance of property to the community is under ordinary circumstances much stronger than a deed to the wife. Nevertheless, a deed of bargain and sale to her presumes that the property conveyed was community property, and if she claims it as her own the fact must be shown by clear and satisfactory proof that her separate funds

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were employed in purchasing it, or that the deed was in fact a deed of gift to her.

(*d*) The presumption that land standing in the wife's name is community property may be overcome by proving that in having the property put in her name he intended to donate it to her. If he purchases land and pays for it out of community property and directs the deed to be made to her as a gift, the title is thereby vested in her. In like manner a conveyance made to a wife in consideration of a debt due to the community from the grantor, with the consent of the husband, and with his intention that the property conveyed shall become hers, will thus operate. The declaration of the husband at the time that his intention in having the deed made in his wife's name was to give her the land is admissible.

Lastly, a conveyance to a wife of land which is known by her husband and receives his sanction or acquiescence, conveys the title to her as completely as by an assertion in a deed. In such a case he is estopped from denying her title.

(*e*) As land conveyed to a husband or wife or both by deed of purchase is presumed to be community property, parol evidence is not admissible to explain or modify the deed in the way of ingrafting on the property after it has passed to innocent persons a trust to their detriment. As between the parties to such a deed, or to purchasers without value or with notice, its legal import may be modified by parol evidence.

(*f*) The increase becomes a part thereof, and is thus stamped with a community character. In Louisiana

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a business which had formerly belonged to and been conducted by the wife, but after marriage is conducted in the husband's name, becomes the business of the community and may be seized for the husband's debts. In Louisiana the increase of separate property becomes community property. In Texas an increase of separate property is community property, with the exception of the increase of separate lands. The law, indeed, seems to be very sweeping in the way of giving the increase of property to the community. Thus, the increase of cattle, which are the separate property of the wife, is community property. Likewise, the profits of a mercantile business conducted by them during marriage belong to the community, though the funds invested in them are separate property.

(*g*) A husband may give or grant the community property or his separate estate, if free from debts and liabilities, to his wife directly, without the intervention of a trustee, and the property thus donated will become her separate property.

(*h*) A husband may reimburse his wife from the community property or from his separate property for advances received from her in preference to other creditors he may owe. A gift from him to her will not prevail against a prior unrecorded deed, but it will against a subsequent deed from him to a third person.

17. Let us next consider what authority she has for making a contract independently of her husband.

(*a*) In many states a married woman can become a sole trader or merchant and carry on business in her

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own name. In some of them these rights and privileges have been accorded to her without any formal statutory law. Where such statutes or conditions exist a married woman may contract and deal in all respects like an unmarried one.

Such an extension of her authority does not prevail everywhere. In New Mexico, for example, she must have her husband's consent before making a contract. In Illinois she cannot enter into a partnership or carry on a partnership business without his consent unless he has deserted her, or is a prisoner, or, in short, is incapable of taking care of her. Likewise, in North Carolina and other Southern states the contracts of a married woman generally are still void except those for necessary personal expenses, or for the support of the family, or for debts existing before her marriage.

(*b*) In some states she can make contracts oral or written, sealed or unsealed, as if she was not married. In Pennsylvania the only noteworthy exception to this sweeping principle is, she cannot become security for the debt of another. She may act as security for her own debt; thus, if she is engaged in business and receives a note from anyone in payment for something, she can indorse it, procure its discount by a bank, and, should the maker fail to pay, be held thereon as an indorser. On the other hand, should a man ask a married woman to indorse his note merely as a friendly act, to raise money thereon for his own use, as she would receive no benefit therefrom except his thanks and perhaps not these, if he failed to pay, she

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could not be compelled to pay for him. In like manner, in Vermont, she is not liable as indorser, security, or guarantor for her husband, and in Indiana and some other states she is not liable as security for anyone. In New Hampshire she is not liable for any undertaking made by her on her husband's behalf.

In New Jersey a married woman, with her husband's consent, may assign and convey any gift or devise to her the same as if she were unmarried. And in Pennsylvania she may give a bond for a legacy which will bind her estate quite as effectively. In like manner, in Colorado, she can execute any bond or note for the payment of money; and if the consideration is for the benefit of her estate she is liable thereon.

In Indiana she may execute an official bond as principal, and be bound by her agreements or covenants of title in the deeds given by her of her separate estate as if she were unmarried.

In Michigan, too, she may, by authority of the courts of probate, make contracts and execute deeds in her own name, which may be necessary to carry into effect the powers granted to her.

In Rhode Island any personal property, furniture, shares, and the like in a bank, or secured by a mortgage, may be sold and conveyed by her as if she were single, and she may make such contracts of sale accordingly, but cannot transact business as a trader.

In Connecticut no sale or transfer of a wife's personal property or any interest therein is valid unless she, or those interested in her estate, join in the

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written conveyance, and all reinvestments must be in in the name of her husband as a trustee.

In Arkansas a married woman may sell her separate personal property without her husband's consent, but he must join in the transfer of her real estate.

In Florida the husband must join in all sales of the wife's property, whether personal or real.

In Alabama a wife has full legal capacity to contract in writing with the assent of her husband, also expressed in writing. In conveying her real estate he must assent by joining in the deed. Her personal property may be sold or conveyed by them orally.

In South Carolina a married woman may purchase property and make contracts as if she were unmarried. The same also is the law in Colorado and Oregon. In Arizona the law is not so broad. Nevertheless she may contract debts for necessaries needed by herself and her children on her husband's credit.

18. In conveying her separate real estate the laws are more specific and require a more complete presentation.

(*a*) In many of the states she cannot convey or mortgage her separate estate unless her husband joins in the deed with her. This is especially so in states where his interest in her land as tenant by curtesy still exists. In Maine a married woman may acquire real or personal property by descent, gift, or purchase, and may dispose of it without her husband's assent or without his joining with her in a deed. In Minnesota a wife may execute a mortgage on land to secure the purchase money without her husband's

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joining with her in a deed. In like manner in North Carolina and Ohio a woman may lease her land for a period not exceeding three years. In Michigan a wife may be authorised by court without her husband's consent to convey or mortgage her real or personal estate. In Indiana a wife may be bound by a contract or conveyance of real estate as if she were an unmarried woman.

(*b*) His consent must be evidenced by a writing duly acknowledged before a proper magistrate. In some of the states to render this act lawful she must be of full age. In others the minority of the wife does not affect the validity of a deed.

(*c*) In other states the wife must acknowledge the deed and her consent be proved by a separate examination. Thus, in Rhode Island the law enacts that she shall be examined privily and declare that the instrument is her voluntary act and that she does not wish to retract it. In the larger number of states there is a clause to the effect that she has executed the indenture willingly without compulsion, or threat, or fear of her husband's displeasure, and that she has been privately examined apart from him with respect to the matter. Wherever it is needful for a separate examination to take place the law usually construes the statutory requirements with considerable strictness.

(*d*) In some states the wife may execute and acknowledge all deeds, mortgages of her separate estate, bills of sale or other conveyances without any action by her husband as if she were unmarried.

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The books are full of cases in which deeds are found to be defective because this separate examination was not as complete as the law requires.

(*e*) In Michigan when any married woman not residing there joins with her husband in conveying real estate situated therein, the conveyance has the same effect and may be acknowledged or proved as if she were unmarried.

In Iowa every conveyance made by husband and wife is sufficient to pass all the right of either in the property conveyed unless the contrary appears on the face of the conveyance.

Any married woman may release her dower by properly joining in a deed with her husband, whether she is of full age or not. In some states she may renounce her dower by a simple renunciation before an officer without any deed showing that purpose

While a mortgage of the owner of a homestead made at the time of its purchase to secure the purchase money is valid, the husband and wife, if both are living, must join in the deed to release a homestead interest belonging to either.

In New York a wife may enter into the usual covenants of title concerning real estate and bind her property thereby. She may execute and deliver her power of attorney to convey land as if she were unmarried. And, in other states, a wife may convey her land by power of attorney, describing the same, duly executed and acknowledged, like a deed.

In Kentucky she can convey her estate by power of attorney only when she is a non-resident of that

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state. She may also release her dower by power of attorney in the same way that she may convey her land by such agency. Such power may be revoked at any time before sale. But the revocation is inoperative except in the county where the land is located.

In Indiana a married woman is bound by her covenants of title in conveying her separate property as if she were unmarried, but in Nebraska a married woman is not bound by any covenant of warranty in a joint deed given by herself and husband.

In Missouri no covenant expressed or implied in such a deed binds a wife or her heirs except so far as may be necessary effectually to convey from her and her heirs all her right and interest which is sought to be conveyed therein.

In New Jersey a married woman may bind herself in such a deed by covenants of title, provided they have no greater effect than to estop her and all persons claiming as heirs, as if she were a single woman.

Lastly, in Maryland, in all deeds of real estate, made to a married woman, she may bind herself and assigns by any covenant running with or relating to the same as if she were unmarried.

19. In land conveyed to a husband and wife both are the possessors during their joint lives of the entirety. Neither of them can sell and bind the other, and the survivor takes the entire estate. Furthermore, an estate thus held by both in common is not abolished by a statute abolishing survivorship among joint tenants. Nor is such a tenancy abolished by any

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legislation enabling married women to hold property independent of their husbands.

20. The husband and wife in some states must join in all sales, transfers, and conveyances relating to her property.

21. A condition in a will in restraint of marriage without any limitation is void. But conditions annexed to gifts, legacies, and devises in restraint of marriage are not void that are reasonable in themselves, and do not directly operate as an undue restraint on the freedom of marriage. A condition to an estate devised to a son and daughter in common that, should the daughter marry, it should belong to the son was held to be a general restraint of marriage and void.

Various conditions have been upheld on the ground that they were merely to guard against haste or imprudence, and these will now be mentioned: First, restraint against persons marrying belonging to specified classes, or against marrying specified persons. Second, a devise or bequest on the condition that should the devisee marry before reaching the age of twenty-one he would forfeit his estate. Third, a condition requiring consent to marry without limitation of age, a provision for a designated beneficiary as long as she remained single, but not after marriage. Consequently, a testator may provide that his unmarried daughter shall hold a devise for and during her natural life unless she shall marry, in which case her life estate shall cease. Such a devise or bequest is merely a limitation of the time of enjoyment and therefore valid.

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A condition in a will which constitutes an inducement to married persons to obtain a divorce or to live separate and apart from one another is opposed to public policy and void. On the other hand, a bequest to a husband and wife who are living apart and while divorce proceedings are pending at the time of executing a will, is lawful.

A gift or legacy to a widow while she shall remain unmarried is valid, and the condition must be respected. This rule prevails everywhere. Said a court not long since: The weight of authority is in favour of treating limitations or conditions which are annexed to devises or bequests to the wife of the testator as valid, although they tend to restrain her from marrying again.

22. Much questioning has arisen concerning estates by curtesy, the nature of which has been already described. By the modern statutes the husband's right to curtesy in the lands of his wife is contingent and does not vest in the husband until her death. Before this event he has no estate by the curtesy, only an expectation. Until then, therefore, the legislature may change, modify or abolish such an estate because it is not vested. In many states the estate by curtesy has been abolished.

23. In like manner the dower right of the wife is a mere expectation, and consequently may be abolished; in other words, it is subject to legislative control. This is not the law everywhere, but it is the law in most of the states.

The wife's measure of dower is governed by the

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law existing at the time of the marriage, or at the time her husband acquired the land.

As the wife's interest is only an expectant right, the condemnation of land to public use under the right of eminent domain discharges any right of dower therein. Furthermore, a statute providing that a widow shall not be entitled to an interest in lands conveyed by her husband while she was a resident does not contravene the Federal Constitution.

24. A mechanic's lien can be laid on the land of a married woman; and wherever she has the powers and privileges of a single woman she must assume the responsibilities and duties corresponding with her position. Consequently, if she knows that her husband has falsely represented his ownership or interest in her property and has contracted in his own name for erecting a building thereon, though the record would disclose her title to the property, she is estopped or prevented from defeating a mechanic's lien on her land.

On the other hand, in Texas, no mechanic's lien can be put on a homestead unless the contract for material is signed by the wife. The same rule prevails in Michigan. In California the lien of a mechanic or material man may be created on a homestead by the act of the husband alone without the consent or joint action of his wife.[1]

25. Not infrequently liability for expenditures on

[1] By a statute giving the husband the management and control of community property, and providing that it shall be subject to mechanics' liens, he is empowered to contract for the erection of a building thereon which will be subject to them.

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her land, and his or her responsibility turns on the question whether at the time of furnishing the materials, or doing the work, her husband acted as agent or contractor. For, if he acted in the latter manner, he alone is liable to those who have done the work or furnished the material. But her participation in the work done, or her directions to the workmen employed, often leads the court to declare that she is estopped from denying that a contract for the work, though made by the husband alone, was not made by her authority nor with her knowledge. By establishing an estoppel against a wife her property is thereby bound.

In many instances the husband's agency is implied from circumstances. Thus, a married woman who has personal knowledge of work done and materials furnished on her separate estate, and to some extent has given personal directions concerning the work, who also has joined in executing a note in settlement of the claim, is bound thereby, and the mechanic's lien may be enforced against her.

On the other hand, such a lien cannot be established on the theory of her husband's implied authority if she protested at all reasonable times against the execution of the contract. On one occasion, without her consent and against her protest, he erected a dwelling-house on her land. But the material man failed to acquire a lien for his materials, though she occupied the premises with her husband, and knew what her persistent husband was doing.

26. Ante-nuptial settlements are made for the special benefit of the wife, and many questions have

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grown out of them. They are perhaps less numerous than formerly. They are made before marriage and rest on a valuable consideration — that of marriage.

(*a*) One object of making them is to insure the support of the wife, and also to make a different disposition of property from that which would be made either by will or operation of law. Not infrequently a settlement is made to render the settlement of an estate less difficult. An eminent judge has remarked that marriage settlements are benignly intended to secure to the wife a certain support in any event and to guard her against being overwhelmed by the misfortunes, unkindness or vice of her husband. A court of equity will effect, if possible, the settlor's intention and not permit it to be defeated.

(*b*) Through settlement each party may relinquish his or her distributive share in the other's estate; the wife may bar her dower, the husband his curtesy. The husband may agree that his wife may retain all her own property to her sole and separate use; he may also add to her possessions.

(*c*) As a rule the rights and obligations arising from the marriage relation cannot be varied by agreement between them. A husband, for example, by merely agreeing to pay his wife a stipulated allowance, cannot always relieve himself of his common law liability to pay for her necessities should the allowance prove insufficient.

(*d*) Marriage is a sufficient consideration to support an ante-nuptial settlement. Says Chancellor Kent:

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"It is the highest consideration in law." [1] A marriage will support a settlement in favour of husband and wife and their children or the children of a former marriage, but it will not sustain a settlement in favour of entire strangers.

(*e*) Such a settlement is sometimes disadvantageous to creditors, and the ancient statute, known as the Statute of Elizabeth, declares void all conveyances of real property made with the intention of defeating subsequent purchasers. But this statute contains a proviso that the settlement shall not defeat any estate or interest made on a good consideration to any person not having at the time notice of any fraudulent purpose.

As marriage is a valuable consideration, ante-nuptial settlements made in favour of innocent parties are not fraudulent as against creditors and purchasers. If, therefore, the settlor was insolvent or his intention was fraudulent, a settlement in favour of his wife who is innocent, and knowing nothing about his condition, will be upheld. Says Justice Story: "Nothing can be clearer both upon principle and authority than the doctrine, that to make an ante-nuptial contract void as a fraud upon creditors, it is necessary that both parties should concur in or have cognisance of the intended fraud. If the settlor alone intend fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it." [2]

[1] Sterry v. Arden, 1 John's Chap, 271.
[2] Magniac v. Thompson, 7 Pet., 393.

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(*f*) A settlement in pursuance of a valid ante nuptial agreement, though not made until after marriage, is supported by the consideration of marriage as if made previously. It cannot be sustained, however, unless in writing, as required by the statute of frauds, which will now be explained.

By this famous statute no action can be brought to charge any person on any agreement made on consideration of marriage, unless the agreement or some memorandum or note thereto shall be in writing and signed by the party to be charged therewith, or by some other person lawfully authorised to charge him.

This statute applies to an agreement by a man and woman in contemplation of marriage that each shall retain the title to his or her own property and dispose of it as if they were unmarried. The memorandum does not affect the existence of a contract, but simply is evidential. The note or memorandum may have been made at the time of making the contract. It need not be a formal written agreement. Any writing showing the terms of the agreement, the particulars, signed by the party to be charged, is sufficient. In a recent case a letter from a man to a mother, proposing to marry her daughter, shown to the latter, and stating that the writer would convey certain land to the daughter after their marriage, was a sufficient memorandum of the agreement to convey. A memorandum, therefore, may consist of correspondence, one or more letters forming a series from which a contract can be deduced will satisfy the statute.

27. As the common law conception of marriage is

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the unity of husband and wife, they cannot make any valid contract with each other. For the same reason they cannot even make a gift. It is needful, therefore, to make valid gifts and transfers of property, to act through the medium of a trustee or third person. There is no law against such action. A husband, for example, who wishes to convey land to his wife, conveys it to a third person who, in turn, conveys the same to her. This method is still practised in many states.

Equity has a different rule. It recognises and enforces contracts made between husband and wife without the intervention of a trustee. The Supreme Court of Vermont declared many years ago that whenever a contract would be valid at law, if made though a trustee, it would be sustained in equity though made without him. Therefore equity will uphold a clear gift by a husband to his wife or any conveyance of property wherein creditors are not to be defrauded.

§ 4. Support and Separation

1. May agree to live separately.
2. This may be done without a trustee.
3. Agreement concerning disposition of property.
4. Release of dower in separation agreement.
5. Wife after separation agreement cannot share in husband's estate.
6. Separate agreement does not prevent absolute divorce.
7. Husband's duty to support his wife.

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8. Her authority to purchase necessaries when living together.
9. Her authority when living separately.
10. Cannot deprive her by giving notice he will not pay.
11. Her authority when living separately by agreement.
12. Allowance must be sufficient.
13. What are necessaries.
14. Husband's duty to bury his wife.
15. His liability for her debts before marriage.
16. Her liability for her debts if surviving him.
17. Tendency to absolute separation.
18. Causes of separation.
19. Adultery.
20. Cruelty.
21. Mental suffering.
22. Desertion.
23. Drunkenness.
24. Crime.
25. Other causes.
26. Effect of connivance.
27. Collusion.
28. Condonation.
29. Recrimination.
30. Legislative divorces.

1. Formerly, husband and wife could not make an agreement, even to live apart from each other; this was deemed contrary to public policy. Now, while the law will not permit even a partial dissolution of

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the marriage contract, yet husband and wife may agree concerning the mode of their separate living and maintenance. A recent jurist has said there is certainly nothing illegal in an agreement between husband and wife to live apart and to divide their property. Such an arrangement is effected through a trustee, and has long had legal sanction.

2. Of late a question has arisen whether such a contract may be made without the intervention of a trustee. To do this is a departure from the common law concerning the rights of the two to contract with each other. The authorities are much divided, yet the tendency is to sustain direct arrangements made between the parties.[1]

3. In separation deeds between husband and wife the parties may agree on the division or disposition of their property, and either spouse may relinquish his or her interest in the property to the other. Such an agreement, made without undue influence, is generally enforced, especially if it be just and equitable. But a separation agreement, made under moral coercion, is void and not binding on the wife. More broadly any separation agreement made through fear on her part of her husband, or to purchase immunity from cruel treatment cannot be sustained.

[1] Ordinarily a contract of separation between man and wife must be by deed, and be signed by both of them, but an oral agreement, if fully executed on the part of the husband, will be upheld in equity.

In California, Colorado, Minnesota and South Dakota the husband and wife may make a separation contract directly between themselves without the intervention of a trustee. If they agree on a division of the community property, each relinquishing all right to the share allotted and assigned to the other, the contract is binding on both and its effect is to deprive the wife of the right to select a homestead out of the separate estate of her husband either before or after his death.

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Articles of separation and the division of property do not bar the wife's claim against her husband for temporary alimony in an action for divorce, when she has not sufficient means.

4. A statute requiring a married woman to join with her husband in a deed of conveyance to a third person to release her dower must be regarded, therefore this end cannot be effected in a separation agreement. A provision in a valid separation agreement made through a trust deed excluding a widow from all dower and interest in her husband's estate will have that effect. A wife's release of her claim for dower is a sufficient consideration for a separation agreement, and if she accepts the provision therein made through a trustee in lieu of dower it will, after her husband's death, bar her dower right. The intention to bar her dower, however, must be clear, or it will not have this effect, especially when the agreement is not under seal, nor acknowledged as prescribed by statute.

5. A wife who voluntarily enters into an agreement of separation, cannot, after her husband's death, have it set aside and be restored to her rights in his surrendered estate. This is not the rule everywhere, especially in states recognising community property. Again, a wife's right to share in her husband's estate is not cut off, though she live apart from him for a few years prior to his decease, unless the agreement shows a clear intention to bar her right to a distributive share of his estate.

6. In the United States a court of equity will never decree a separation between a husband and wife in

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execution of a stipulation of the most formal kind between themselves. It will seek to accomplish the lawful objects of the deed of separation, but not the separation itself.

Nor will an agreement prevent either from maintaining an ordinary action for divorce, whether the case occurred before or after the agreement. But a separation agreement for the purpose of facilitating divorce or the dissolution of the marriage relation is illegal and contrary to public policy.

7. The husband must support his wife. This is the common law everywhere. So long as he fulfils his obligation she has no power to pledge his credit, even for necessities, unless by actual authority. But on failing to support her, she is authorised to pledge his credit for them, otherwise she might starve.

8. While living together the presumption exists that he has given her authority to purchase necessities on his credit. A tradesman, therefore, who brings an action against him for such articles furnished to her establishes a prima facie case by showing that she was living with her husband and that the articles were in kind, quality, character, and quantity suitable to their condition in life. On the other hand, he may rebut this presumption by showing that she was forbidden to pledge his credit.

9. While living apart from her husband, there is no presumption that she has authority to pledge his credit even for necessities; the presumption is, in truth, the other way. Under these circumstances a tradesman, in order to hold the husband liable, must

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show authority in fact, or else bring his case within a rule that will be now mentioned.

10. To prevent her from starving while they are living separately, and for a good cause on her part, she has an absolute right to pledge her husband's credit for necessities. His liability is based on his duty to support his wife. He can, however, escape by showing that credit was given to his wife herself, or that she had a sufficient separate income, or that he made a sufficient allowance.

The rule applies more strongly in cases of unlawful separation from his wife, without making suitable provision for her; or of his misconduct causing her departure. Of necessity she then becomes an agent to supply her wants on his credit. Nor does her ability to provide for herself affect the rule. But if she leaves him without justifiable cause she forfeits the right to obtain necessities at his expense.

Should she return and be received by her husband the right revives, but only for future necessities. This is also true after her offer to return and his refusal to receive her.

11. This rule does not apply when they are living apart, by mutual agreement, unless no provision has been made for her support. The fact that the person who furnishes her with goods has no knowledge of the allowance is immaterial; in supplying her he acts at his peril.

12. The allowance must be sufficient for the wife's necessities. Whether they are or not is a question of fact to be decided in each case, unless she has agreed

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to accept a stipulated allowance and not to apply to her husband for more.

13. What are necessities for which she may pledge her husband's credit? They include not only those articles of food and clothing which are required to sustain life and preserve decency, but others suitable to maintain her according to the estate and degree of her husband. Many specific things have been declared to be necessities: wearing apparel, furniture, jewelry, even legal expenses relating to the restoration of conjugal rights and other things.

14. Lastly, the common law imposes on the husband the duty of burying his wife properly, and if he neglects to do so, and this is done by some other, the husband is responsible for the funeral expenses. His liability is not changed by the fact that his wife left property by will to another person, even should he assist in the arrangements and attend the funeral. It has also been said of a husband who is living apart from his wife through her own fault, though he would thereby be relieved from liability for her necessities, he would still be liable for the expense attending her burial.

15. By common law the husband is liable during marriage for the debts contracted by his wife while she was a single woman. But if not collected during her lifetime his liability continues no longer. Even though he may have received a large fortune from her by marriage, he retains the same by common law, unless some statute says to the contrary, free from liability to answer for her ante-nuptial debts. How

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this rule of the common law has been changed by statute we shall soon learn.

A husband's liability is limited to the debts that were legally binding on his wife, consequently were she a minor at the time of marrying her, he would be only liable for the debts that had been incurred for necessary support. For example, had she been fond of dress, and large bills were awaiting payment at a dressmaker's or milliner's, he could not have been held for them.

16. A wife who survives her husband becomes liable for her debts contracted previously, though in the meantime she may, as we have seen, under the operation of the common law, have been kindly relieved of all her means of paying them. This, of course, is not a cheerful situation, either for herself or for her creditors.

17. The law recognises cases in which the happiness of the parties, as well as the policy of the state, demands their separation. Two kinds or modes are in vogue in different states; either absolute separation, or a partial one. The tendency of the times is clearly in favour of an absolute separation, for the reason that experience has shown that a temporary or partial separation is often harmful to both parties.

We have already shown that parties may agree to live separately, though they cannot make any valid agreement to divorce themselves from each other. In other words, the agreement is not a dissolution of the marriage relation. Even to do this was regarded at one time by the law with great disfavour. But one of the great masters of equity of our time has said

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that a change has come over judicial opinion in this regard; other considerations have arisen and people have begun to think that after all it is better and more beneficial for married people to avoid in many cases the expenses and scandal of suits of divorce by settling their differences equitably by the aid of friends out of court, although the consequences may be that they would live separately.[1]

18. Besides agreements to live separately as one of the modes of lessening somewhat the unhappy condition of married people, the law for several causes permits an absolute separation. These are defined by statute, and differ in the several states. In some of them only one or two causes exist for an absolute separation; in others several. Generally, it may be said, the Western states have adopted more grounds than the older ones; though some of the Eastern states have perhaps as many or more grounds for legal separation than Indiana, Idaho or any other Western state.

19. Of these causes adultery has long occupied the first place in all the states; and for this cause an absolute divorce may be granted. Next to this cause that of cruelty is the most general. This is not a legal cause in every state, but in many of them. The law is often difficult to apply, for cruelty is a relative term. Some of the statutes say extreme cruelty, others, repeated cruelty; others, cruelty and abusive treatment, and the like. To constitute a ground for divorce it must consist of acts of physical violence. Denial of ordinary comforts and accommodations and want of civil

[1] Sir George Jersel, Besant v. Wood, 12 Ch. Div., 605.

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attentions are not enough to constitute a ground for divorce. In every case in which a divorce is sought on this ground the proof must be sufficient to satisfy the statute. Much depends on the temper of the judge. One man may be more tender and humane than another, and therefore regard an act in a different light or way from another.

20. A writer says that the doctrine almost universally accepted is that cruelty to be a ground of divorce must consist of physical cruelty, either direct or consequential without personal violence in conduct which is attended with bodily harm, which renders it impossible or unsafe to discharge the duties of married life. Actual violence is not necessary to constitute cruelty; threats of violence made in earnest and which indicate an intention to do bodily harm are sufficient.

Furthermore, the station in life, the situation of the parties and all the attendant circumstances will be taken into consideration. A single act committed in a sudden passion might not constitute cruelty, when the same act committed as the result of a deliberate act intended to abuse would suffice.

A divorce on the ground of cruelty will not be granted to an applicant who has in any manner been a party to the other's misconduct. As a foundation for a divorce cruelty must be unmerited and unprovoked. Says the court in one of the cases, if her conduct be incompatible with the duty of a wife, if it justly provoked the indignation of her husband, she must reform her own disposition and manner. Although the applicant may have drawn the ill-treatment, of which

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she complains, on herself, if it is wholly out of proportion to her offenses, intemperate and inexcusably severe, her conduct will not bar her right to relief.

21. By some statutes mental suffering is a cause for divorce. For this is often more serious to the health and happiness of a person than even physical violence. When suffering is so great that it presses on the mind and undermines the health, though the suffering is caused by words and conduct unaccompanied by any act of physical violence, the result is bodily harm and such conduct constitutes legal cruelty. The tendency of the modern courts is to grant divorces for this cause.

22. Desertion is also another ground for divorce. The law generally prescribes a period of time for this to be a cause for permanent separation. In some states the limit is three years, in others only one. Desertion may occur without going away. A husband who drives his wife away from him by his misconduct, giving her a justifiable cause for leaving him, deserts her as completely as if he had left her.

To satisfy the statute the prescribed period of desertion must be continuous. An offer to return, made by the deserted spouse in good faith at any time before the separation has continued for the statutory period, will bar a divorce, though refused by the deserted party. But such an offer, after the desertion has lasted for the prescribed period, is too late.

The mere ceasing to live together for the time prescribed by statute is not desertion, unless there was an intention to abandon. Separation, for example,

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by reason of absence, business, or sickness is not desertion within the meaning of the law. As was said on one occasion, mere desertion may result from necessity or accident and be against the will of both parties.[1]

Though an intention to abandon may not exist at the time of separating, it may be formed afterward. When it is, and continues, the separation is desertion, but the period of desertion does not begin until the intention is formed. It is sometimes difficult to determine in a case of an unintentional separation to prove the time of the change.

Not only must there be an intention to abandon, but this must be without the consent of the party abandoned. Nothing is better settled than that a predetermined attempt to make a cause for divorce, by agreement between the parties, will utterly fail in its purpose. An agreed desertion falls within this category.

23. Some other causes for divorce may now be briefly mentioned. In nearly all of the states habitual drunkenness is one of them. Of course, this means something more than a single act of drunkenness. By the general rule in nearly all the states the drunkenness must be of a gross and confirmed nature.

24. In many states the conviction of either party of a crime and sentence to state prison is a ground for divorce. In some of them the nature of the sentence is not prescribed, in others the sentence must be imprisonment for a number of years. In some states the

[1] Bennett v. Bennett, 43 Conn., 313.

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statutes cover a conviction and imprisonment in another state.

A woman cannot knowingly marry a felon and set up his conviction afterward as a ground for divorce. The sole exception is marriage in ignorance of the fact. Such cases have happened.

25. A divorce is rarely granted for insanity, though in some states this is a sufficient cause in cases of incurable insanity; also impotency.

Religious differences may be a cause for divorce. Such cases are happily very rare, growing out of peculiar religious convictions concerning the propriety of life.

The innocent party to a marriage through fraud or duress may have it annulled or set aside.

In like manner a marriage may be annulled that is within prohibited degrees of relationship; or because the party was already married to another or was under the age of consent.

In some states there is a sweeping provision for granting a divorce for any general reason rendering the married life a failure. By this general provision divorces are often granted, the causes lying largely within the discretion of the judge who hears the application.

26. In the way of defenses the connivance of the husband and wife to wrong-doing will prevent favourable action. A court remarked on one occasion that a connivance may be so open, coarse and revolting that there may be no injury to redress.[1]

[1] Morrison v. Morrison, 142 Mass.. 361.

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To constitute connivance there need not be any active, wrongful act. Says Lord Stowell: "I have no difficulty in saying that passive conduct is as much a bar as active conspiracy; when a husband indicates an intention to have his wife transgress, or at least an intention to allow her to do so undisturbed and unprevented, this amounts to connivance."

27. In no case will a divorce be granted after proof of collusion between the parties, even though there was a valid cause for legal separation. Any agreement between them by which a divorce is sought by imposing on the courts is regarded as collusion. In general, it is collusion for them to act in concert in the conduct of the suit. The husband, however, may make the wife a reasonable allowance while the suit is pending to save the expense of an application for alimony.

28. An offense may be condoned which will bar a suit for divorce. This applies to every offense that may be committed.

Condonation is always conditional. When the condition is not expressed the law implies that the particular offense shall not be repeated, and that the offender shall treat the other with conjugal kindness. A breach of this condition will revive an original offense as a ground for divorce just as fully as if it had never been condoned.

Condonation may be by words of forgiveness, but an offer to forgive will not operate as a condonation unless accepted by the other party. Condonation may be implied by the conduct of the parties without proof of forgiveness in words.

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Condonation necessarily implies knowledge of the offense committed; mere suspicion is not knowledge. Forgiveness, therefore, of an act is not forgiveness of unknown acts, but when the terms of forgiveness are general there should be actual knowledge of every offense.

29. A good defense is any conduct which constitutes a ground for divorce against the complainant. This is known as the doctrine of recrimination. It is founded on the idea that the one who asks for relief must come into court with clean hands. A woman who applies for a divorce on the ground of cruelty will not succeed who has been guilty of extreme cruelty herself. In other words, the party applying for relief must be innocent. In one case a court said a proper administration of justice does not require that courts should occupy their time in giving equitable relief to parties who have no equities. Divorce laws are made to give relief to the innocent, not to the guilty.

The statutes have rarely covered the subject of recrimination except in England. It is a difficult question often to determine when charges of a different character are brought against a complainant, whether they would be regarded as a ground for withholding relief.

30. In some states under peculiar conditions divorces are granted by the legislature; formerly this was a frequent practice; of late years the courts are so efficient in administering divorce laws that application is now rarely made to a legislative body.

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CHAPTER XII

THE PARENTAL RELATION

1. Legitimacy of children.
2. Adoption.
3. Formerly there was no legal obligation to maintain a child.
4. Duty of father by modern law.
5. Widow's duty.
6. Duty of divorced husband.
7. Mother's obligation does not include her husband's liability.
8. Continuance of obligation.
9. Father's duty when child has property.
10. Parental duty of protection.
11. Education.
12. Child as agent for parent.
13. Parent's right to correct his child.
14. Mother's authority to exercise correction.
15. Custody of child belongs to father; next, mother.
16. Father's right of custody cannot be taken to improve prospects of child.
17. Action of court in deciding claims of different parties.
18. When child can be heard in making choice.
19. Custody in cases of divorce.

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20. Parent's agreement to relinquish custody.
21. Reclamation.
22. Father is entitled to child's earnings unless emancipated.
23. And may sue for his wages.
24. Unemancipated child can make no contract for his services.
25. His earnings may be taken by his father's creditors.
26. Emancipation by parent's consent releases child's wages.
27. As long as emancipation continues.
28. Emancipation by operation of law.
29. Emancipation may be implied.
30. When parent is estopped to deny emancipation.
31. Parent's gift of services to child does not require a consideration.
32. Relinquishment for consideration cannot be revoked.
33. Earnings of emancipated child cannot be taken by his father's creditors.
34. Abandonment of child.
35. Recovery for wrongs done to child.
    a.— A wrong is something more than an injury,
    b.— Recovery of medical expenses, etc.,
    c.— To recover loss of service this must be shown,
    d.— Recovery will not be defeated by child's absence at time of injury.
36. Both parent and child can sue.

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37. Liability of parent for wrongs of his child.
38. Action against liquor seller for furnishing child with intoxicating liquors.
39. Action for abduction.
40. Property acquired by child other than for service belongs to him.
41. Payment to father for child is no discharge.
42. Gift of parent to child.
43. Advancement to child.
44. Child is not legally bound to support his parents.
45. Domicile of child.
46. Apprenticeship.
47. Adoption of children.

1. Before setting forth the law requiring parents to support and educate their children, a preliminary question must be considered relating to the legitimacy of children. By the common law the children of a void marriage, born afterward, are illegitimate, though the parties acted in good faith. The same thing may be said of voidable marriages. This was rough law indeed, and has been greatly modified by statute. The statutory rule now prevailing probably in every state is that the marriage of two people legitimises in all cases their offspring so that their children may inherit like all others.

2. Children are sometimes adopted, and important questions arise concerning them both to their former parents and to their new ones, especially in inheriting property.

By adoption the natural parents are divested of all

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personal rights and are relieved also of all legal duties toward their children. They lose, and the adopted parents acquire, the right to the adopted child's custody and control, to his service and earnings; on the other hand, they are relieved of the duties of maintaining and educating him.

In some states the adopted child becomes the heir of the adopted parent, like a natural child, except that he cannot take from the adopted parent's kindred either lineal or collateral. He can also inherit from his natural parent and kindred as though he had not been adopted, thus inheriting from both his natural, as well as his adopted, parents.

Turning to the other side, suppose an adopted child has property, and dies, who can inherit? If the property comes from an adopted mother, on the child's death it will go to his adopted father, thereby excluding his natural parents; if the property has not come from one of them, the question is still open whether the other will take it on the death of the adopted child.

In Missouri the court has declared that though the legal relation of parent and child exists between adopted parent and child, yet as the statute vests the right of inheritance in the child only, the adopted parent cannot inherit from the adopted child. That court has even declared that the property of a child, acquired from an adopted parent, by the statute goes on his death to his natural parents. This ruling has been often criticised.

In Massachusetts the legal status of an adopted parent and child has been carried far enough to hold

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that an adopted child will take like a natural child by virtue of a residuary clause in an adopted father's will, giving all property not otherwise devised to his child or children.

3. By the ancient common law there is no legal obligation on the part of a father to maintain his child. This is also the English law. Morals are one thing and sometimes the law is another; this is an illustration of the wide gap between the two.

4. The American rule is quite different. A legal writer asserts that the parent is legally as well as morally bound to support his children who are incapable to care for themselves, if able to do so; if neglectful of his duty, which is performed, even against his wish or direction, by another, the parent is liable therefor. The law fastens the liability on him, though no contract exists.

5. There is a conflict of authority over the question of a widowed mother's duty to maintain her minor children. In some states she is held liable; in others, not. Should she marry again the stepfather is under no obligation to support her children by her first husband.

6. Should a wife be divorced from her husband his duty to maintain the children would not pass to her, because they would not pass by the decree. But if the care and custody of the children were awarded to her, then the obligation to support them would also pass, unless the courts should decree otherwise.

7. The mother's obligation is not inclusive of her husband's liability. Thus, an Ohio court has said

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that his duty to support his children is not to be evaded by so conducting himself as to render it necessary to dissolve the bonds of matrimony and to give the mother the custody and care of the infant offspring. Alimony, therefore, in its proper significance is not maintenance to the children, but to the wife, and the fact that there has been a judgment of divorce, alimony, and custody of minor children to the wife will not of itself operate as a bar to a subsequent claim against the husband for the maintenance of the children.

8. A father's obligation to maintain his child continues until he is able to provide for himself. In no case does it extend further than to necessary support. The legal obligation ceases, except by statutory law, as soon as the child reaches his majority, though ever so helpless and his father ever so wealthy.

9. A child that has property of his own, while his father's means are insufficient, may be maintained and educated from his own income. In some cases even the principal of the fund belonging to the child may be used in this manner. As a general rule, a father who possesses ample means to support and educate his child must do so, nor will any allowance be made from his child's property for this purpose, unless his fortune is much greater.

What allowance, if any, shall be made to a father for his child's maintenance is a broad question of equity. The circumstances of each case, including the respective estates of father and child, must be considered, and the decision should be just and reasonable with due regard to the general rule of parental duty.

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10. The duty of the parent to protect his child is recognised by the common law. A parent may justify an assault and battery, or even a homicide in defending his child.

11. The duty of a parent to educate his children suitably to their station in life is a moral, not a legal duty by the common law. But the state has enacted statutes on this subject too imperative for anyone to disregard; and the strong tendency is to go further and further in the way of requiring children to be educated at private or public expense.

12. A child can be authorised to act for his parent. As an agent he can bind his parent by a contract for necessaries or for other things in accordance with the ordinary principles of the law of agency. Thus, a person may act as an agent who, by reason of his minority or other incapacity, is unable to act for himself. And his right to thus act in purchasing necessaries may be established from slight evidence. Thus, a father who permits his minor child to purchase goods on his account, either for himself or for his father, and pays for them without objection, creates the presumption that the minor had full authority to make such purchases.

Consequently, although credit may be given to a child and not to his parent the latter becomes liable, on the theory that his child has contracted, not for himself, but as an agent for his parent, and therefore has pledged his parent's, and not his own credit.

13. A parent possesses authority to correct his child. Says Chancellor Kent: "The rights of parents result

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from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority, and, in support of that authority, a right to the exercise of such discipline as may be requisite to the discharge of the sacred trust."[1] A parent, therefore, has a right to correct and punish his child in a reasonable manner. So long as he keeps within this rule he is not answerable to the law. The same rule, it may be remarked, applies to a school teacher.

A parent cannot inflict excessive punishment, nor wantonly or without cause. If he does he is answerable criminally for assault and battery, murder, or manslaughter, depending on the offense he has committed. The rule is difficult to define, for parents must be allowed to exercise some discretion. A jury cannot exercise this for them.[2]

14. A mother possesses the same right as her husband to the control of the children who have passed to her by reason of his death or separation. An authority has marked that there seems no reason to doubt but that even during the father's lifetime, even against his objections, a mother has a legal right to cor-

[1] 2 Comm., 203.

[2] "The right of parents to chastise their refractory and disobedient children is so necessary to the government of families, and to the good order of society, that no moralist or lawgiver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise upon light or frivolous pretenses. But at the same time that the law has created and preserved this right, in its regard for the safety of the child, it has prescribed bounds beyond which it shall not be carried. In chastising a child the parent must be careful that he does not exceed the bounds of moderation, and inflict cruel and merciless punishment. If he do, he is a trespasser, and liable to be punished by indictment. It is not, then, the infliction of punishment, but the excess which constitutes the offense; and what this excess shall be is not a conclusion of law, but a question of fact, for the determination of the jury."—Johnson v. State, 2 Humph. (Tenn.) 283, 36 Am. Dec., 322.

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rect her children. But this statement is open to criticism.

15. By common law a father is entitled to the custody of his minor child. This is an absolute right unless he is legally unfitted to have the custody. After the father's death the right passes to the mother.

16. The father's right cannot be taken away, even if the prospects of the child may thereby be greatly improved. The Supreme Court of Arkansas has remarked that "it is one of the cardinal principles of nature and the law that, as against strangers, a father, however poor and humble, if able to support his child in his own style of life and of good moral character, cannot without the most shocking injustice be deprived of the child by anyone whatever, however brilliant the advantage he may offer. It is not enough to consider the interest of the child alone."[1]

The best interests of the child are to be considered with due regard to the father's rights. If he is a drunkard, or a criminal, or shiftless, or otherwise unfitted, the interests of his child should outweigh the father's right of custody. Again, if the father deserts his wife and child, leaving him to the care of others, his welfare may outweigh his father's right when he subsequently seeks the aid of the court to regain the custody which he has thus lost. Even when he relinquishes the custody of his child to another at the latter's request, and for what he supposes to be for the child's interest, he may be regarded in a sense as having neglected his parental duty. Conse-

[1] Verser v. Ford, 37 Ark., 29.

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quently his right to the child's custody when he seeks to regain it, particularly after a lapse of years, must yield to the child's interest.

17. In ascertaining what is best for the welfare and happiness of a child, a court will consider the ties of nature and of association, also the character and feelings of the parties contending for the child's custody; the child's age, health, sex and surroundings; and finally the education, development and pecuniary prospects of the child.

18. A child that has reached the age of discretion is often allowed to make his own choice and his wishes will always be taken into consideration. The rights of parents and guardians should also be respected.

19. In granting a divorce, either to the husband or wife, the complainant is not always entitled to the custody of the infant child. As in other cases, the best interests of the child will determine this question. The custody of a young child or one in delicate health needing a mother's care will ordinarily be awarded to her, at least temporarily, even though her husband be without fault. If one of the parties is unfitted and the other fit, the question of the child's custody is easily settled by applying the test of parental fitness.

The decree does not permanently settle the matter; a change in the circumstances of the parties to the divorce may authorise the court to order a change of the custody of the children.

20. An agreement between mother and father to relinquish his right to the custody of a child is declared to be against public policy and void. Says a legal

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tribunal: "The care and custody of minor children is a personal trust in the father, and he has no general power to dispose of them to another." [1]

While this is the general rule, yet the courts do not entirely ignore such an agreement. While the law does not countenance it, the interests of the child form the controlling consideration. The courts have frequently refused to restore the custody of a child to a parent, especially after a separation for years, and the child has transferred his interests and affections to his adopted home. To do this would be a serious wrench to the child's affections and the law will not compel him to return. Nevertheless, the change of custody is not so complete as to prevent the courts from further action when this is demanded by the child's welfare.

21. The agreement must be clear and definite. And the courts have held that an oral agreement between a father and a third person, giving up the custody of his child during infancy, does not prevent a reclamation.

22. So long as a minor child is supported by his parents and has not been emancipated, the father is entitled to his services and earnings. After his death the mother is entitled to them to the same extent as the father would be, if living.

The same rule applies to a wife whose husband has deserted her, or is in prison, and who is obliged to maintain her children.

23. As a parent is thus entitled to the earnings of

[1] State v. Baldwin, 5 N. J. Eq., 454.

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his children, he may maintain an action for a child's wages against one who has employed him; and the action may be brought in the parent's name. The right is personal to the parent and cannot be assigned; but the rule does not prevail everywhere; in some states a parent may assign his child's services for a consideration inuring to the father.

24. As long as a child is not emancipated he cannot make any contract for service with another that will bind the father; nor give a valid discharge for his wages. One, therefore, who pays a minor for any service he may have rendered does so at his peril; for, should the father sue him for the amount, payment to the son would be no defence. The same principle applies to an apprentice who is employed without his master's consent.

A father whose child is employed without his consent may ratify his child's contract and recover thereon, or repudiate it and recover for the value of the service thus rendered.

25. As the earnings of an unemancipated child belong to his father, they may be reached by his creditors and subjected to the payment of his debts, just like any other property. Again, if such earnings have been used to purchase other property, this can be taken by the father's creditors in like manner.

26. A child may be released from parental control and entitled to his earnings by his parents' consent. By thus emancipating him the parents' rights, duties and liabilities also cease.

27. While emancipation continues the parents'

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authority over his child is gone, and he is entitled to his earnings free from any claims made by his parents or his parents' creditors; on the contrary, he is obliged to care for himself. Furthermore, on his death his earnings pass to his administrator.

28. Emancipation may be effected by operation of law, even against a parent's will. It has this effect by the valid marriage of the child. It may be effected through the wrongful conduct of the parent indicating a renunciation of the parental relation — abandonment and neglect to support his child. In one of the cases the court remarked that, although the general principle is clear and unquestioned, a father is entitled to the services of his minor child and all that he earns by his labour, yet it seems to be equally clear that as the right of the father to the services of the child is founded on his duty to support and maintain him, if he should fail, neglect or refuse to observe and perform this duty, his right to the services of his child ceases to exist, and this we hold to be the law.

29. Emancipation may be implied, even though the child remains at home, from his father's promise to pay him for his services during minority. On such a promise he can maintain an action against his father to recover them. As the presumption is against the contract, the child must prove its existence, in order to recover against his father.

Emancipation also may be implied from the conduct of the parties. Its existence or non-existence is to be determined by all the facts in each particular case.

30. A parent who leads others to believe that he

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has emancipated his child, and who acts on this belief, will be estopped to deny emancipation to their prejudice, whatever the fact may be. Thus, if a child makes a contract on his own account to serve another, which is known by the father, who makes no objection thereto, the other party may safely pay the child his earnings. The payment will bar any claim to them by his father.

31. A parent's gift to his child of his services does not require any consideration to endow it with vitality. As there is no consideration, the gift may be revoked at any time before the child has acted thereon. In other words, the same principle applies to this as to any other gift — it is not binding on the donor until acceptance.

32. The relinquishment of this right by the father for a valuable consideration cannot be revoked. Says the Supreme Court of Massachusetts: As a minor may hold his title and right to earnings by a contract with his father under seal or for a valuable consideration there is no reason for holding that the father may revoke this contract at his pleasure more than any other contract. On principle he should be as fully bound as by the conveyance of land or other property to his child.[1]

33. An emancipated child is entitled to his future earnings and services against his father's creditors, even though he be insolvent. The courts have gone so far as to declare that even though the intention be to prevent creditors from enforcing their claims against

[1] Abbott v. Converse, 4 Allen, 530.

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such earnings or the property purchased with them, this may be done. A creditor cannot, so a tribunal has declared, make his debtor work in order to pay his debt, nor can a creditor force him to make his children work or sell a valuable interest which a father has in the services of the children. We may add the words of the Supreme Court of Pennsylvania: "A father is not bound to work his son or daughter as he would work a horse or slave for the benefit of his creditors."[1] But when an arrangement is a fraud to defeat creditors then a court will not hesitate to set it aside.

34. A child who is abandoned by his father and left to provide for himself is entitled to his earnings as a means of support, and his father has no claim on them.

35. Should a child be assaulted and injured the law regards this as something more than an injury.

(*a*) The parent is deprived of his services and consequently may sue to recover them. If the child is so young that he cannot perform any service, and is cured before reaching a serving age, there can be no recovery for a mere loss of service, for the child can render none. This is the English doctrine. In many states the principle is held that there may be a recovery for prospective loss of service however young or incapable of service the child may be at the time of bringing the action to recover them. The loss of service or expenses must be a proximate result of the wrongful conduct of the person sued.

(*b*) A parent may recover the extra expense oc-

[1] McKinney v. Cyphert, 27 Pa., 220.

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casioned by the wrongful conduct of another; for example, for the medical or other expense incurred in curing him. Whether the parent can recover for such expenses independently of his loss of services is a question still puzzling the judges.

(*c*) To recover for the loss of service this must be shown; for a child that has been wholly emancipated there can be no loss of service, therefore none can be recovered. On the other hand, the father of an unemancipated child would have right to recover for the loss of services thus sustained.

(*d*) Should the child be temporarily absent from home at the time of the wrongful injury, this will not defeat the recovery.

36. For the wrong done to a child there are two causes of action — one by the parent and another by the child. The law is somewhat technical and declares that a child cannot sue for a damage to a parent, nor a parent for a damage to a child. Thus, a father can maintain an action for wrongfully excluding his child from school, because he alone is injured. On the other hand, a child that is injured by an assault and battery alone can sue for the personal injury, for the damage is to him and not to his parent. Such is the general law, yet, as we shall soon see, it is somewhat contradictory.

37. A parent is under no liability for the torts or wrongs of his child not committed with his knowledge nor by his authority, expressed or implied. But a parent who authorises his child to act as his agent or servant will be liable for the wrongs committed by him

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in the course of his employment. As a court in a recent case has said, a father is never liable for the wrongful acts of his minor son unless the acts are committed with the father's consent, or in connection with the father's business.

A father is not liable for the unauthorized assault by his son, though he may have known that he was vicious; but if he knows that he is committing a wrong and makes no effort to restrain him, the law regards him as consenting and authorising its commission.

A parent who aids or abets his son's acts may become criminally liable for them, just as he would were he aiding and abetting any other criminal, but he does not incur any criminal liability for his child's act to which he is in no way a party.

38. By the common law a parent could maintain an action against a person for furnishing his child with intoxicating liquors. In many states this right of action is given by statute, which is founded on the supposition that a father is deprived of his service and is perhaps compelled to expend money and care for the recovery of his child.

39. The right of a parent to the custody and service of his child gives him a right of action against anyone who abducts or designedly entices his child away from him, or who harbours him, knowing that he has wrongfully left home. The remedy may be an action to recover for the service of the child, or an action of trespass, as it is called, for the wrong and subsequent loss of the child's service. The harbourer's intention is immaterial. Should a runaway child be employed

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in good faith, without knowing that he has run away from home, his employment would not be a legal wrong.

In thus suing the recovery may include the expenses for regaining the custody of the child. The gist of an action is the loss of the child's service.

40. Whatever property a child may acquire, except as a compensation for his services, belongs to him absolutely, and the parent has no claim thereon. The court long ago remarked that a parent has no title to his child's property, nor is the capacity or right of the latter to take property or receive money by grant, gift, or otherwise, except as a compensation for services, in any degree qualified or limited during minority.

41. From this it follows that anyone who pays money belonging to a child to his parent does so at his own risk, and will not be protected by the parent's discharge. Whatever a parent gives to his child in the way of support and maintenance and for purposes of education, clothing, school books, etc., may be reclaimed; whatever a parent gives, not in the way of support and maintenance but with the intention of making an out-and-out gift, is the child's property.

42. This leads to the rule that a gift by a parent to his child, accompanied by delivery, is just as valid as any gift made by others, or as a gift between strangers; the relationship of parent and child imposes no disability upon them to contract with, or give to each other.

As relationship between parent and child easily

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permits the exercise of undue influence by the parent, consequently a gift or conveyance by a child to his parent will often be presumed to be the result of undue influence on the parent's part, and may be avoided by the child after attaining majority. Even the presumption of undue influence from parental relations does not cease on the child's attaining his majority, but continues until a complete emancipation of the child's judgment from the parent's control.

In one case a daughter soon after reaching her majority, made a gift to her father of some land. A court afterward examined the transaction with the most jealous scrutiny and suspicion.

43. A gift made by a parent to his child in anticipation of his share of the parental estate is known as an advancement, and is duly regarded in the distribution whenever the parent dies intestate. But not every gift from a parent to a child will be thus considered. Payments made for the ordinary expenses of maintenance and education are not advancements, nor gifts of money for current expenses or other similar presents; but substantial payments of money, or the delivery of other property, or real or personal, of considerable value are often presumed at least to be advancements. Says the court in one of the cases, the presumption is that a father who gives a large sum in one payment to a son intended to start him in life or make a provision for him.

44. A child in many states is under no legal obligation to support his parents, even though they are destitute and infirm; in others, by statute such an obliga-

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tion exists. His moral obligation no one will dispute. While they are entitled to his wages during minority, on the other hand, as he bears to them no legal duty of maintenance, no promise on his part to pay even for necessities furnished to them will be implied. Consequently, should they be furnished, no action therefor against their child can be sustained.

45. The domicile of a legitimate child is that of his father. Consequently if the parent changes his domicile that of his child changes also. A mother's domicile acquired after her husband's death determines that of the child, but the child's domicile will not follow the mother's in case of her remarriage, remaining unchanged by that event.

46. Apprentices are persons, generally minors, who are bound to a master for a term of years to learn some art, or trade, and to serve his master and be maintained by him during his apprenticeship. In most cases an apprentice is bound by a sealed writing or deed, but this not a positive requirement unless so declared by statute. If the agreement is broken by either party, the other may maintain an action against him for the injury. His master has a right to the services of his apprentice, and to all the wages he may earn through his employment by others.[1]

Not only can a parent bind his child, but the overseers of the poor can apprentice a child who has no property. Of course an adult can bind himself. As the father of an illegitimate child has no control over

[1] Tiffany on Domestic Relations, p. 476, 2nd Ed. See also Chap. XV., § 2, of this work.

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him, he cannot bind him as an apprentice. Again, a mother, if the father be living, cannot bind out her child as an apprentice.

The statutes perhaps in every state prescribe the mode of binding an apprentice. The officers should inquire into the fitness of the master to have charge of the education of the apprentice, and when he has been bound to an improper person the courts will grant relief. An apprentice cannot be assigned to another master. In the contract of apprenticeship, whether made by the minor himself, or by his parent or guardian or by persons clothed with public authority, the law presumes that a special regard was had to the personal character and capacity of the master. The action of a master who sent his apprentice abroad on a long whaling voyage from which the master was to receive his earnings was condemned.[1]

47. The adoption of children is regulated largely by statute. In some states only a minor can be adopted, in others an adult may be, also a waif. The proceedings are usually statutory, and when these exist, no other way can be used. A broad or sensible construction is given to them.

A decree of adoption, rendered by a court, may be revoked on proper proceedings by the same tribunal.

Unless the statute requires notice, none to the child is necessary in a proceeding for its adoption. If the child has a guardian, assent by him will be sufficient.

Under a statute of another state providing that an adopted child shall take the name of the adopting

[1] Randall v. Rotch, 12 Pick., 107.

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parents and have all the rights of a child and heir, a decree of adoption will at once establish the relation of parent and child and invest him with the capacity of an heir-at-law. The legal rights of the child thus established will be recognised and upheld in every other state, unless opposed to its laws and policy.[1]

Under the Civil Code of California the wife has precisely the same right to adopt a child as the husband, and both may unite in the application for the adoption as the child of both.[2]

[1] Van Matre v. Sankey, 148 Ill., 536.
[2] In matter of Williams, 102 Cal., 70.

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CHAPTER XIII

DISABILITIES AND LIABILITIES OF MINORS

1. Attainment of majority.
2. Cannot appoint an agent.
3. Liability for wrongs due to accident.
4. Age of criminal irresponsibility.
5. Rules of law in actions of minors in which negligence is the defense.
6. Liability of minors.
7. Wrongs growing out of breach of contract.
8. Fraud.
9. Minors as office holders.

1. It is proposed in this chapter to treat more fully of the rights, disabilities, and liabilities of minors. By the common law males at fourteen and females at twelve can dispose of their personal property by will; neither can make a valid devise of real estate until attaining majority. In this country the matter is regulated entirely by statute, and no distinction is known between males and females.

2. A minor cannot empower an agent or attorney to act for him, nor affirm what another may have assumed to do on his account; consequently, he is not liable for wrongs alleged to have been committed by his agent.

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3. In some cases the inability of very young children to be intelligent actors has been recognised. In these the wrong is considered due to unavoidable accident. When malice is a necessary element an infant may or may not be liable as his age and capacity may justify in imputing malice, or may preclude the idea of his indulging in it.

4. A child below the age of seven cannot commit a wrongful act; he is regarded as absolutely irresponsible. Between the ages of seven and fourteen while this presumption exists, it may be rebutted. In the latter class of cases it may be proved that he was of sufficient capacity to have a criminal intention. To warrant this intention the proof must be clear and decisive. Confession of crime is not sufficient unless supported by other evidence. When a child has reached the age of fourteen he is presumed to be capable of committing crime, and to escape responsibility must show affirmatively want of capacity.

In England a boy of ten years old who, after killing a little girl, hid her body, was held criminally liable because the facts showed a mischievous discretion. In that country a boy of eight years has been hanged for arson, another in this, four years older, for murder.

5. We have already described the wrongs done to an infant, and when his parent may recover for them.[1] In actions by a minor to recover the ordinary rules of law governing in questions of negligence are applied, modified to meet the changed conditions. Thus, a young child is incapable of contributory negligence,

[1] Vol. IV., § 35, p. 992.

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or, in other words, of participating in any way in the negligence by which he has suffered. Again, a less degree of care is required of an infant than an adult. The degree depends on the child's age and knowledge.

An adult will be held to a higher degree of care in dealing with a minor than with a person of mature age and understanding. When a child is too young to exercise care some courts hold that contributory negligence on the part of his parent or guardian will prevent recovery by the child. This rule is denied by other tribunals.

6. With respect to the liability of minors, the law, says the court in a well-considered case, has proceeded rather on the theory of compensating the injured party than of consistently maintaining any logical doctrine concerning the mental attitude of the wrong-doer, and of placing the liability on the wrongful intention. Lord Kenyon once said in the case of an infant who had committed assault or uttered slander, "God forbid that he should not be answerable therefor in a court of justice." When a wrong is committed by a minor under authority or command of a parent, the latter is liable while his child escapes.

7. A child who is liable for a wrong arising from a breach of contract cannot be deprived of his defence of infancy by changing the form or method of proceeding against him. Thus, he cannot be made liable on a contract by suing him in an action of tort for negligence. On the other hand, a minor who should hire a horse expressly for riding, and not for jumping — which should be killed by a friend while jumping

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would be liable for doing what he had promised not to do; in other words, for acting outside the contract.

For a wrong that is not a mere breach of contract, but distinct, a minor may be liable. Thus, should a minor hire a horse to ride, and injure it by overriding, he would be liable.

8. This question frequently arises in actions against minors for fraud growing out of contracts. An action which proceeds on the basis or theory of a contract cannot be maintained. Thus, an action will not lie against a minor for false warranty in a sale of goods, or falsely warranting a horse to be sound. But if a minor fraudulently induces another to deal with him by falsely representing that he is of age, and afterward seeks to avoid the contract, the other party may maintain an action of deceit against him. On one occasion a minor, who represented himself to be of age, bought a quantity of hats of a dealer for the purpose of supplying his store. He afterward declined to pay the bill, declaring and proving that he was under age, and could not make a valid contract for their purchase. The court declared this to be a good defense to the action, and that there could be no recovery on the contract. On the other hand, he had lied to the seller and was liable in an action of deceit, which did not rest on any contract. Moreover, the damages which the vendor could recover in his action of deceit was the value of his goods, so that in the end justice was as completely attained as it would have been by declaring that an infant liar could make a valid contract.

The same rules apply to insurance contracts as to

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others with respect to the capability of persons to make them. Whether minors can become members of beneficial associations is still an open question. On one occasion the court said: "Infants cannot make the contract of membership for themselves and it is not clear how the parents can make it for them." [1]

9. A minor may hold an office that is purely ministerial, but not one requiring the exercise of discretion. He cannot hold a public office for the receipt and disbursement of moneys, nor act as administrator. A court would not appoint a minor a trustee because he would not be liable for a breach of trust, and could not give a bond for security of the property coming into his possession. Furthermore, he might be wanting in discretion to execute it properly, though this charge may be strongly sustained against many an older sinner.

[1] Commonwealth v. Keystone Beneficial Assn. 171 Pa., 465; In re Globe Mutual Beneficial Assn., 135 N. Y. 280. Contra. — Chicago Mutual L. Ind. Association v. Hunt, 127 Ill., 257.

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CHAPTER XIV

GUARDIANSHIP

1. Father and mother natural guardians.
2. Testamentary guardians.
3. Chancery guardians.
4. Statutory guardians.
5. Guardian ad litem.
6. Married women as guardians.
7. Executor or administrator as guardian.
8. Guardianship is a personal trust.
9. Consequence of assuming to act without authority.
10. Selection of guardian.
11. Ward's domicile is proper place for appointment.
12. Ward follows domicile of guardian.
13. Guardian's custody of ward.
14. Education of ward.
15. Support of ward.
16. Ward's remedy when necessities are withheld.
17. Support is limited to ward's income.
18. Guardian must exercise care in managing ward's property.
19. Suits.
20. Investments:
    a.— Guardian must use good discretion,
    b.— Rule where no statute exists,

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c.— Where statute exists it must be strictly followed.

21. Cannot convert personal into real estate without judicial consent.
22. Management and sale of real estate.
23. Sale of personal property.
24. Should not mingle his ward's funds with his own.
25. Purchase of ward's property by guardian is voidable.
26. Liability of guardian for exceeding his authority.
27. His liability for ward's contracts.
28. Territorial authority of guardian.
29. Guardian must account for ward's property.
30. Final accounting.
31. Arrangements between guardian and ward.
32. Compensation.
33. Gifts from ward to guardian.
34. Mode of terminating guardianship.
35. Removal of guardian.
36. Remedy of ward against guardian.
37. Liability of surety.

1. By the common law the father is the natural guardian of his children, and entitled to their custody during their infancy; on his death the guardianship vests in their mother; on her death in the grandfather or grandmother or any other person who is next of kin. There are, as we have seen, some exceptions to this rule,[1] arising from a due consideration of the child's welfare.

[1] See Vol. IV., §§ 17–21, p. 98.

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The natural guardian of a child has control of his person only, and not of his property. Formerly, there was a guardianship known as socage, whereby the nearest relative might lawfully receive the rents and profits of the ward's land during infancy. This kind of guardianship exists nowhere in the United States, except perhaps in New York. There the law provides that when an estate in land shall become vested in an infant, his guardianship shall belong first to the father; if there be none, to the mother; if there be neither father nor mother, to the nearest relative of full age, and making further provision in case a guardian does not appear from any of these relations.

2. In England testamentary guardians may be created by will, and this mode of appointing them is in vogue in some states. To be effective the intention to appoint such a guardian must be clearly expressed. The authority is derived from the testator's appointment, and in some states requires no judicial confirmation. When the power has been exercised by a testator the court has no jurisdiction to appoint a different person. In some of the states the appointment is made subject to probate of the will, approval of the court and giving a satisfactory bond. The guardianship extends to the person and also to his estate and continues until the ward arrives at full age.

3. In England guardians are often appointed by the Court of Chancery; in this country the statutes regulate their appointment. This authority is generally excluded by the courts of probate or other statutory tribunals. They are often called statute guardians,

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because their powers and duties are determined largely by statute.

4. In Texas a statute providing for the office of a guardian excludes the idea of the appointment of a second to succeed the first before his removal; consequently a person appointed by the will of a father or mother as guardian of the estate of a minor child is not entitled to the appointment of a guardian while another appointed at the father's request in his lifetime is qualified to act.

5. Every court, in which an action is brought against an infant without a guardian, has the power to appoint a person to defend him. For, as he cannot appoint an attorney, unless the court appoint one for him, he would be helpless. The person thus appointed is called a guardian ad litem, and his powers and duties are limited to the defense of the suit. Generally he sues by his next friend.

6. It was once against the policy of the law for a married woman to act as guardian; this is no longer the rule. When her husband is unsuitable the appointment has been refused on the ground that she would be under his influence. A non-resident is rarely appointed because he is not amenable to the jurisdiction of the court; in some states this is forbidden by statute.

7. An executor or administrator of an estate in which an infant is interested is not a proper person to act as a guardian, because his duties may clash; the trustee of an infant is regarded with more favour, unless some reason appears to the contrary. A court

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may appoint a corporation as guardian whenever it is authorised by statute to act in that capacity.

8. The office of guardian is one of personal trust that cannot be assigned.

9. A person who assumes to act as guardian and takes possession of an infant's estate may be treated by him as a wrong-doer, or as a guardian. Says a chancellor of New York, a mere stranger or wrong-doer who acquires possession of the property of an infant and receives the rents and profits may in equity be regarded as his guardian or may be compelled to resign.

10. In selecting a guardian the court has a liberal, but not arbitrary, discretion. It will generally respect the claim of a father to act in this manner. So, too, a person appointed or selected by a testator by his will to act as guardian for his children, the court will, unless there be good reasons for disapproving him, appoint and confirm.

Nevertheless the best interest of the child will prevail, even against a father's wish, should he not be a suitable person. When the father is not living the mother will generally be appointed, unless there is a good reason for appointing another. If the child is an orphan the preference will be given to the next of kin as against strangers. By common law an infant over fourteen can select his guardian, and by statute an infant of that age may generally nominate his guardian, who, if suitable, is appointed by the court.

An infant may appoint a guardian to supersede one already appointed by the court; this is not the law everywhere.

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11. In appointing a guardian the place of an infant's residence determines the question of jurisdiction, but when a non-resident infant has property within a jurisdiction, a guardian may be appointed there, although the legal domicile of the infant be elsewhere. Residence is always sufficient to confer jurisdiction. An appointment where an infant has neither residence nor property is void. The appointment of a court having jurisdiction can only be set aside by direct proceedings in the same court. In other words, the proceedings to set aside an appointment must be as formal as those appointing a guardian.

12. The domicile of the ward usually follows that of the guardian. This question sometimes is very important in determining the ward's rights and liabilities. Guardians may change the municipal domicile of a ward from one place to another in the same state. Whether a guardian has the power to change his ward's domicile from one state or county to another is an open question.

In all cases, unless the statute prevents, the court has the power to restrain the removal of a ward should his interests be thereby injuriously affected. The court, as the protector of children, has this power, even as against their natural guardian, though it must be a very extreme or special case to induce interference.

13. A guardian is entitled to the custody of his ward's person as against strangers and all relations of the child, except his parents. The rights of these are generally regarded as superior to those of a guardian. In awarding the custody of a child's person, even as

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between parent and guardian, the courts will exercise a reasonable discretion, and, when a question arises concerning the right to his custody as between his parent and another, will be largely influenced by the child's best interests. If old enough to have an opinion of his own, the court will also consider his wishes.

The court has a discretion, and the child's welfare is the judicial pole-star. The child must be protected in the enjoyment of his personal liberty, and on arrival at the age of discretion must have his personal interest and safety guarded by the law.[1]

14. The guardian should maintain and educate his ward in a manner suitable to his means from the income of his estate. Although the father is living, a guardian should provide for his ward's maintenance out of his estate, provided his father is unable to provide for him. A court of equity will order an allowance for such maintenance.

15. A guardian is under no personal obligation to support his ward. Therefore, the law implies no promise that he will pay even for his ward's necessities. Says the Supreme Court of Virginia, a guardian is not responsible either personally or in his fiduciary character for necessities furnished his ward without his consent, express or implied. As he has no authority to make advances from his own means for a ward's maintenance, should he do so he cannot recover the amount advanced after the latter attains his majority.

[1] The custody and control of an infant child will not be restored against her wish to her father, who transferred her before she was a month old to a relative, who has reared her in happy contentment for twelve years or more. See Tiffany's Persons and Domestic Relations, § 125, p. 254.

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This does not prevent the guardian from advancing the means necessary to support the ward, nor prevent him from reimbursing himself afterward.

Nor will a guardian who, at the time of taking his ward into his family and supporting him, though not intending to charge him therefor, be allowed for his support. And when a child is living with, and supported by, his guardian as a member of his family, and renders ordinary household services, he may set this off against his guardian's claim for maintenance. This is not the law everywhere; by the law of several states a guardian who takes his ward into his family to live with him is entitled to a reasonable compensation for his board and clothing.

16. A court will compel a guardian who should wilfully withhold necessities from his ward to supply them. And a stranger who, during the interval, should supply them, would be reimbursed out of the ward's fortune; but no one can furnish even necessities without the guardian's consent and maintain an action against him for the amount.[1]

When, therefore, a guardian refuses or neglects to furnish his ward properly the remedy is by application to the court, which will dismiss the guardian for neglect of duty, or the infant himself may supply his own needs. If he be so young that he cannot contract himself, a third person may supply his wants.

No consent on a guardian's part can be implied when necessities are furnished without his knowledge, nor can his consent be implied if the consequences are

[1] Call v. Ward, 4 Watts & Serg., 118.

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such that the party furnishing them has no reason to believe that the guardian consents.

17. A guardian's authority is limited to supplying the ward's needs from the income of the estate. He cannot exceed the income without judicial leave. If he thinks that a larger sum ought to be expended he can submit the matter to the consideration of the court and act as it may decide. This rule is necessary to protect the ward's property.

18. A guardian has the general management of his ward's estate, and to a considerable degree acts according to his own discretion and judgment. He must exercise ordinary prudence and care. Should he not do so he will be held liable for the consequences. Too often he has abused his trust. For this he can be called to account by the court during his guardianship, or else by the ward after attaining his majority.

In one of the cases a court has remarked that the fiduciary relation requires vigilance as well as honesty. A dead and sluggish calm, a supine negligence is full of peril to a minor; it is often as fatal as positive dishonesty.

19. In a general way a guardian's duties and powers are like those of an ordinary trustee. He should take possession of his ward's property of every kind and enforce any claim the ward may have against other persons to any kind of property. To this end he may maintain suits whenever they are necessary.

Legal proceedings should ordinarily be conducted in the ward's name, but many of the rules pertaining to them are technical, and need not be considered

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here. A guardian may compromise claims against a ward's estate and his submission of them to arbitration will be binding. In a suit brought by a guardian to protect his ward's property an allowance will be made for advice and legal service. A guardian cannot charge his ward with attorney's fees made necessary by his own negligence.

20. (*a*) The general rule is everywhere recognised that a guardian or trustee in investing property must act honestly and faithfully and exercise a sound discretion, such as men of ordinary intelligence use in their own affairs.

(*b*) In the states without statutes prescribing how the funds of a ward shall be invested the courts are not in harmony. Generally, investments in public or real securities, like government bonds and real estate mortgages, have judicial sanction; also, investments in the stock of corporations, especially of railroad and banks that are solvent and pay regular dividends. On the other hand, guardians and their sureties are generally responsible for losses on investments made on the credit of individuals or firms. Personal security is not deemed sufficient.

In many states this subject is carefully regulated by statute. It should be carefully observed, for, should a guardian do otherwise, though with the most reasonable expectation of obtaining a larger return for the ward, he would, in the event of a loss, be responsible. His good intention would be no legal defense.

(*c*) A guardian who is appointed in a state outside his ward's domicile should not, in accounting for his

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investments, be held to a narrower range of securities than is allowed by the law of his domicile.

21. A guardian cannot convert personal into real estate without judicial consent, nor can he erect buildings on the land, nor make permanent additions to them, but he can pay taxes and encumbrances out of the income of the estate, when such action is necessary for the preservation of the property, without a judicial order.

22. In managing his ward's real estate a guardian may lease it for a period not longer than the ward's minority. Should he make a longer one his ward may avoid it on attaining his majority for the excess. The guardian may cut timber when this will not amount to waste, but cannot lease mineral lands without judicial authority. If he occupies the ward's lands himself he will be liable for rent, also for depreciation caused by improper cultivation. He must keep the buildings in repair unless the income is insufficient. Should they not be rented or injured by his neglect to repair them he would be liable.[1]

The sale of a ward's real estate is regulated almost everywhere by statute, and is done by judicial order. Greater authority is given to a guardian in dealing with the ward's personal property. A sale made by a court without jurisdiction is annulled and at any time may be attacked. But when having jurisdiction, the sale cannot be attacked collaterally, or in any other proceeding for irregularity.

The authority of a court ordering a sale must be

[1] Tiffany, § 174, p. 335.

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strictly followed, otherwise it will be invalid. The guardian must be properly appointed, and the deed must have all the requisites needful to its validity. It must show the authority on which the guardian acted; in short, must contain a full description of the power whereby the guardian proceeded in selling his ward's estate.

23. In some cases a guardian is restricted from selling without judicial order his ward's personal property. It has been said that the purchaser will acquire a good title thereto, if sold in good faith, even though the law has not been strictly regarded. "Having the power to sell," so a court has remarked, "without obtaining any special license or authority, a title under him acquired bona fide by a purchaser, will be good, for he cannot know whether the power has been executed with discretion or not, and an estate is always supposed to be secured by a bond given by a guardian for the faithful execution of his trust and discreet management of the property." [1]

24. A guardian ought not mingle the ward's funds with his own in the same bank account. Happily for the ward, should his guardian violate this plain principle of law, he is a kind of preferred creditor, so to speak, should the bank fail, and may recover money in preference to all other creditors, except those toward whom a special trust relation somewhat like his own exists. His right to recover is complete in all cases whenever the trust property exists, or can in any form be identified. Formerly this principle had less value

[1] Ellis v. Proprietors, 2 Pick., 243.

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for the reason that after the misappropriation of a trust fund too often it could not be recovered because it no longer existed. But since the adoption of the modern conception of a trust fund, including the original property or any other that has been substituted therefor, there is a greater opportunity for recovering the trust fund in the event of the depositor's failure; consequently a ward recovers with increasing frequency the property misapplied or misused by his guardian.

Some courts adopt a less stringent doctrine and do not subject the guardian to a loss whenever he has acted in good faith. Cases have happened, therefore, in which a guardian has put the money of his ward in his own name, not with the view of committing any fraud or of gaining a personal advantage, but it may be with the expectation that in some way the ward would be the gainer, perhaps be subjected to less taxation. Some of the courts have decided that a guardian who thus acts in good faith, and with no intention of wronging his ward, cannot be held personally liable.

A guardian who uses a ward's money in his own business, or otherwise converts it to his own use, is guilty of disregarding the law and will be charged with compound interest.

25. A purchase by a guardian at a sale of his ward's property may be set aside as voidable. Formerly the law condemned such a sale as contrary to public policy, or as inconsistent with the guardian's duty. This is only another application of a great principle

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that an agent ordinarily is not permitted to purchase his principal's property for himself, even though he pay an adequate price therefor, because the temptation for wrong-doing is so very great. Nevertheless, the modern rule is greatly relaxed in this regard and, instead of holding such sales to be absolutely void, they are usually voidable. In other words, in the case of an infant or minor he has the right of inquiring into a sale in every case, and can set it aside should he deem it against his interest or tainted in any manner with fraud.

Again, a guardian who should under this broad principle buy the property of an infant ward before the latter has reached a period of comprehending the nature of the transaction, the rule would apply. Numerous cases of this kind have occurred, in which a guardian has taken advantage of his position to defraud his ward. Should the court learn of his conduct he can be speedily brought to account, removed and compelled to respond for the wrong. Such a discovery and subsequent action are sometimes the work of some relative or friend of the ward. Should the transaction be buried and kept in the dark until the ward arrived at age or afterward, then he could proceed against his guardian for an accounting; for running through the entire fabric of the law is the principle that time does not obliterate a fraud, though it does obliterate or end an ordinary business transaction. A man gives a note to another and either neglects or forgets to pay within a specified period. After that time the law puts an end to the transaction

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unless the maker acknowledges his obligation to pay. The statute of limitations as it is called, works in this manner, and is very wide in its operation. Happily, this statute does not run in cases of fraud between a trustee of any kind and his beneficiary. Therefore, after the beneficiary's discovery of the fraudulent conduct of his guardian, he has a right to proceed against him at any time within the statutory period. In other words, no statute of limitations runs against a guardian or other trustee until six years or longer period after the fraud has been discovered by the beneficiary or ward, and six years or longer after he has attained his majority, or is capable of acting independently in enforcing his rights.

When trust property has been wrongfully taken by a trustee the ward may assert his right to the specified property in two ways. One of these is to follow it into the possession of the person to whom it had been conveyed, unless he is a bona fide purchaser for value without any notice that it was trust property. The other way is to follow the property that has been substituted for the trust estate, so long as this can be traced.

26. A guardian who acts beyond the scope of his authority, though with good faith and intentions, will be personally liable. If such action is beneficial to the ward the guardian is protected and the ward will take the benefit. It is on this principle of justice that a minor, after attaining his majority, is permitted to make his election to adopt and confirm the contracts of his guardian, though made without authority of

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law, that are to his advantage and to repudiate those that are injurious. Thus, should a guardian sell the land of his ward without legal authority, he can elect to accept the price, or reclaim the land when he comes of age, whoever may be the purchaser.

Again, as an administrator cannot by his promise bind the estate of his intestate, neither can a guardian by his contract. But a guardian who creates a liability in excess of the estate is personally liable for the excess.

27. On the contracts of his ward a guardian may render himself personally liable, but in proper cases he is entitled to be reimbursed out of the ward's estate.

28. The authority of a guardian is confined to the county or state of his appointment. Unless his appointment is recognised as a matter of comity by a sister state or foreign court, he has no right with respect to the person or property of his ward therein.[1] But the authority of a foreign court is sometimes recognised by comity. And in making a new appointment the request of a foreign guardian to be appointed is generally respected.

In many states there are statutory regulations authorising a foreign guardian to act on complying with proper regulations, the filing of a certified copy of his appointment, and the giving of a bond.

[1] In a recent case, decided in New Hampshire, the court held that though by comity the rights of a guardian appointed by one state to the custody of his minor ward, living with his consent in another, may be recognized in a habeas corpus proceeding brought by him in that state, yet the controlling consideration in determining whether the ward should remain where he is, or be placed with the guardian is, which will best promote the ward's welfare. Hanrahan v. Sears, 72 N. H., 71.

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It is often needful for a guardian to act in a foreign state because the ward has property there. Thus, a ward living in Pennsylvania may be the owner of stock in a New York bank, and his guardian is desirous of having the stock transferred to himself in his official capacity as guardian. In such cases the filing with the New York bank of a certificate of the guardian's appointment in Pennsylvania would ordinarily be sufficient authority to justify the bank in making the transfer desired. But banking and other institutions are extremely particular and sometimes require a person to be appointed in their own state before recognising his right to act officially as a guardian.

29. A guardian must file an inventory of the property of his ward's estate, prepared by disinterested persons, and render an account thereof from time to time, usually annually. Such an inventory or account is not final or conclusive of the facts contained therein but, as the books say, is prima facie correct. In other words, the facts are presumed to be correct until they are disproved.

30. At the end of his term of office the guardian must render a final account of his stewardship, and this account, like all others, may be examined or attacked on the ground of fraud or mistake. Very often such accounts are passed at the time of rendering them, because there is no one to dispute them, as a ward from year to year has no knowledge, in many cases, of his affairs, except that derived from his guardian. After attaining his majority and coming into possession of his property, which must then be

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turned over to him, he often makes the unwelcome discovery that his guardian has been neglectful or unfaithful in administrating his trust. He then can apply to the proper tribunal to have the accounts opened and re-examined, or, if without a remedy of this kind, a court of equity is always open to him, and such relief may be granted as justice shall require.

31. All arrangements made between a guardian and his ward are regarded by the court with suspicion. Not infrequently they are examined and set aside. Furthermore, the final settlement of a guardian's account is by no means final. In a court of law the moment of emancipation, so a court has remarked, from legal pupilage is the moment of absolute power and unlimited capacity. A court, therefore, extends its watchfulness further, and requires that the discharge of the guardian shall not be precipitated; that ample time shall be allowed for consultation and inquiry; that there shall be a full exhibition of the estate and of its administration.

32. With respect to compensation, no regular commission is fixed by law, and the matter is largely within the discretion of the court. Should the estate be large the compensation is graduated.

33. A gift from ward to guardian during guardianship is presumed to have been made by undue influence, and will be set aside unless it is shown to have been entirely voluntary and clearly understood by the ward. Nor will lapse of time ratify the gift.

For the same reason a gift or conveyance to a

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guardian made by his ward shortly after the termination of the guardianship is presumed to have been made under undue influence and will be set aside unless it is shown to have been entirely voluntary.

34. A guardianship may be ended in several ways. The first is by the attainment of the ward's majority. But if a guardian continues to manage his ward's estate after his majority without making a final settlement, this will constitute in effect a continuation of the guardianship. In other words, he is said to be acting as a *quasi* guardian; "and must account for all transactions on the same principles which govern his acts during the ward's minority." [1]

Of course, guardianship ceases on the ward's death. The guardian has no right to administer his ward's estate, but must adjust his account with the ward's legal representatives.

Again, on the guardian's death, his executors or administrators have no authority to act as guardian, but must settle the accounts of the guardianship and pay the balance to the successor.

When there are joint guardians and one dies the survivor can continue the trust.

The guardianship of a female ward is terminated by her marriage, but the guardianship of a male ward who marries under age continues.

The marriage of a female statutory guardian does not terminate the guardianship. By statute the law is otherwise in some states; in others her husband becomes the joint guardian with her.

[1] Tiffany's Persons and Domestic Relations, § 186, p. 348.

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A testamentary guardian has no right to resign, but when he refuses to act the court may appoint a successor.

Statutory guardians are often permitted to resign from office, and when there is no provision on the subject their tender of resignation is sufficient ground for appointing another.

35. Courts of probate, surrogates, and similar courts have authority to remove guardians. Generally, their authority is ample enough to remove guardians of every kind; of course, this is not done without cause. There may be a great many causes justifying such action on the part of a tribunal.

Some of these may be mentioned; for example, his own personal use of his ward's property; his failure to apply the income to his ward's support; wasting the estate; failure to file inventory of the ward's property when ordered; personal interest offered to that of his ward; immorality or bad habits, conviction of a crime or any cause rendering him incompetent to manage the estate. Insolvency is not a necessary disqualification, but it is often a good reason for removal. Again, a guardian who has obtained his appointment through false representation may be removed.

36. For misapplying his ward's funds what is the remedy? The ward cannot recover damages during the guardianship, though if he should be assaulted by his guardian this might be a ground for his removal or for redress in criminal courts.

A court of proper jurisdiction can make such orders

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during the guardianship as are needful to protect the ward's estate. Again, a bill in equity may be brought by a ward through his next friend to compel his guardian to render an account. An action will lie against a guardian who retains his ward's property after the close of the guardianship to recover it.

37. Guardians are required to give bonds with security that are satisfactory to the court for the faithful discharge of their duties. Nor have they any authority to act until this is done. A guardian and his sureties are responsible for all property of whatever kind coming into his possession, as well as all losses accruing through his failure to perform his duty. The sureties are not liable for property received or acts performed after the guardian's final discharge.

The termination of a guardianship does not relieve his sureties from liability for property received and acts committed during the guardianship. Should a surety die his estate would be liable. An action on a guardian's bond will not lie usually until the guardian's liability is determined by the settlement of his final account.

Sometimes a special bond is required; for example, on the sale of real estate by a guardian under the license of the court. In these cases the sureties thereon are liable for any failure on the part of the guardian to execute his authority to sell property, and not the sureties on the general bond.

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CHAPTER XV

EMPLOYER AND EMPLOYEE

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1. FORMERLY, the law of apprenticeship was very common, and the most rigorous rules regulated its formation and maintenance. Now, perhaps in every state the relationship is chiefly regulated by statute. Doubtless the law everywhere requires the articles of apprenticeship, whether between minor and master, or between father or guardian and master, to be in writing and sealed. The minor is not required to join in the deed itself.

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2. The master has a right to the service of his apprentice, and to his wages earned by serving others. He cannot, however, assign an apprentice to the service of another. A right of action exists against anyone who entices away an apprentice from his master, or knowingly harbours him after leaving without cause.

3. The way is now clear for considering the larger subject of the relationship between master and servant. A servant is one employed to render a personal service to his employer otherwise than in the pursuit of an intelligent calling, and who, in rendering such service, remains entirely under the control or direction of his employer or master. A servant, therefore, includes a bookkeeper or clerk of a business office, a salesman, builder, workman in a factory, etc.

A man cannot compel another to labour for him; on the other hand, a person cannot perform a service for another, and render him liable therefor, without his consent. A servant, therefore, who should engage in temporary work for another by the false representation of a person, that he had been directed to employ him for a master, would not establish the relationship of servant, rendering the master liable for the service performed.

4. The contract for service need not be put in words, either written or spoken; it may be implied from the conduct of the parties. Thus, should a man labour for another at his request, or with his knowledge and consent under such circumstances as to give rise to the belief that a compensation is expected, the law

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would imply a contract, and the servant could recover compensation for his work.

A service performed for another without his knowledge does not imply a contract between them. Again, when the parties are related in a family way, and the service is performed by one in the way of performing household or other familiar duties, no presumption arises of an expected payment. In order to recover therefor a contract must be positively shown.

After the expiration of a contract of hire for a specific period, and a servant continues in his master's services with his consent, and without a new agreement, a new contract of hiring is implied on the same terms and for the same period as the former, unless there are circumstances showing a different intention.

5. The contract of hire in many respects is governed by the same principles of law as apply to all other contracts. The promise must be mutually binding, for if there is not mutuality the contract is void as in other cases.

6. In like manner the parties to make a valid contract must be of full age. Should an infant enter into a contract of service it would not be binding on him, and he could at any time thereafter leave and recover for the value of the service.

On the other hand, the other party is bound to a minor who chooses to hold him liable on his contract.

7. We have already shown how the statute of frauds affects many contracts. In some states this statute also applies to the contract of hiring. In these, to be binding, it must be performed within a year, or

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be in writing. A contract, therefore, for a year's service which is to begin at a future date is within the statute and cannot be enforced. A contract for a year which is to begin at once, or without any stipulation for beginning, is not affected by the statute. Hence, for services performed under the contract there may be a recovery for their value.

8. A contract for indefinite service may be ended at any time by either party. The circumstances may show a contrary intention, and when this is proved it must govern. The payment of wages at specific periods does not necessarily show that the hiring is for a specific period, and not a hiring at will. On the other hand, it is not a hiring for a longer period than is specified.

A hiring to last as long as each party is satisfied may be terminated at any time by either of them.

9. The relationship may be ended in various ways. One way is by fulfilment. Another is by the death of one or the other; and another way is by agreement that it shall no longer be binding.

10. Sometimes a new contract is substituted for the old one. This operates as a waiver and the rights of the parties are of course fixed by the new contract.

11. Sometimes the contract gives a party the right to terminate it on a particular condition. A servant, for example, who is employed to work for a specific time according to the master's satisfaction, may be discharged whenever the master truly becomes dissatisfied with him. In such cases the master is

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the sole judge to determine whether the servant is satisfactory or not.

The right of an employee who has made a contract for employment as long as his work shall be satisfactory and to quit work at his option as a part of a compromise of a claim for damages for injuries received in the service of the master, does not give the employer a reciprocal right to terminate the contract at pleasure, since the employee by refusing his claim is paid a valuable consideration for the option.

12. In England and in many of the states contracts for hiring for a specific period are regarded as entire, and a servant is not allowed to recover for his service unless he proves full performance. Thus, a servant who wilfully abandons his master without cause before the end of the term, or is guilty of such a breach of contract as justifies his master in discharging him, cannot recover on the contract, even for the services actually rendered prior to the abandonment or discharge of it.

To a contract that is divisible a different rule applies. Even though the abandonment or dismissal was wilful, an employee can recover for the service he has rendered.

13. Of course, a servant who has not performed his entire contract is nevertheless entitled to wages if he has a legal excuse for non-performance. Thus, should an employer die before the end of the term or period of service, wages may be recovered of the personal representative of the deceased for the service actually rendered.

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14. Though a servant cannot recover on a contract which he has himself broken, some courts hold that he can recover on an implied contract whatever his service may have been worth. Whenever this rule prevails the master has the same right to sue the servant for any injury he may have received in consequence of the servant's unlawfully breaking the contract, and can recover damages if any has been sustained by reason of the other's neglect or unwillingness to fulfil his contract. But he cannot remain idle during the term for which he was hired, and then, at the end of it, bring an action to recover wages for the entire term. It may be said, therefore, that the measure of damages in such cases is the wages he would have earned under the contract, less any other amount he has actually earned in other employments, or which he might have earned by the exercise of proper diligence in seeking employment along the same line of business. This is the general rule now enforced in the various states.

15. The servant of a master who renounces the contract before the time of its completion may treat the contract as broken and sue at once for damages without holding himself ready or offering to do more. The same thing is true when a master, either before the time for beginning or while the servant is working, does some act making its fulfillment impossible.

16. The other party, however, has the option to regard the contract as in force, or as ended. Thus, the servant of a master who discharges a servant without cause need not treat the contract as ended; he may be ready to continue his work, and when thus act-

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ing can recover for each instalment of wages as it falls due during the period for which he was employed. But this is not the law everywhere, some courts holding that, after a master has broken his contract, the hiring is at an end and that the servant may sue for the injury he has received.

17. A contract may be affected by custom or usage; thus, in many places the custom exists of giving a month's notice before terminating a contract, which is legal. By dismissing a servant at the end of a month's notice, employed by virtue of a contract with this provision, it is discharged but not broken.

18. There is an implied contract on the servant's part that he is competent to discharge his duties. For incompetency he may be dismissed, and in doing so there is no breach of the contract. Hence, a servant may be discharged who is unfit by reason of intoxication, or other cause, fully and properly to perform his duties.

19. He may also be dismissed before the expiration of his term for criminal or immoral conduct, wilful disobedience, habitual neglect of duty, for larceny or embezzlement, either from a master or from a third person; for cheating or defrauding his master. Thus, should a servant, a cashier, overdraw his salary, his master would have a good reason for discharging him.

20. The dismissal has been justified of a house servant who went to see her sick mother supposing her to be dangerously ill; this is carrying the principle too far. A dismissal was in one case justified of a

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servant who refused to go on an errand without his dinner; in another of a farm hand who refused to work without having his beer; in another case, of an employee who smoked in his shop in violation of rules.

The general rule, however, governing all cases of disobedience is that such an act, to justify dismissal, must involve injury to the master. Says the court: "Wilful disobedience means something more than a conscious failure to obey. No doubt domestic discipline must be more rigid than that in business employments, but there must be a limit to the arbitrary power of the master."

A servant who seriously injures the business of his master by his deportment may be dismissed, but slight discourtesies, exhibitions of ill-temper, are not sufficient cause for dismissal.

A servant who without his master's consent enters any other employment or business for himself which may tend to injure his master's business is a good ground for dismissing him. This is so because it is the duty of the servant not only to give his time and attention to his master's business, but, by all lawful means at his command, to protect and advance his master's interests.

21. Another cause for dismissing a servant is the impossibility of performing a contract. This arises from a change in the law, or by judicial action. Also when the object for which the service was to be performed is destroyed without failure of either party, or by the death of either party, or by the unfitness of a servant caused by illness or personal injury, or,

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lastly, by the prevalence of a contagious disease in the vicinity where the servant is working which renders the place unhealthful. The master's insolvency does not discharge him from the obligation to pay the servant for the full term, or justify him in refusing to pay damages for not executing the contract.

22. A servant who has been ill-treated by his master may leave and recover as though he had been wrongfully discharged. Of course, the non-payment of wages as required by the agreement is a breach of the contract.

23. A master who wrongfully discharges his servant cannot by ordering him to return to work afterward put the servant in the wrong. After he has been wrongfully dismissed the contract is broken by the master and the servant need not return, even though requested.

24. The master may condone or waive his servant's conduct and having done so cannot afterward justify his future dismissal, or defeat an action by him for wages.

25. A servant is always liable to his master for a violation of his duty whereby his master is injured. Thus, he must labour with due diligence and fidelity and with as much skill as persons of ordinary capacity who are engaged in the same business or employment usually exercise. A servant is as much bound to exercise reasonable care of his master's property as the property of other persons.

In like manner he is liable to his master for injury caused by his negligence to the property of third

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persons entrusted to the master. A servant who uses in his own business his master's property is liable to the master for its value.

26. A conspiracy between servants to injure their master in his business gives him a right of action against them for any damages he may sustain. Thus some tailors, by virtue of a conspiracy between them, stopped work for their master and simultaneously returned his garments in an unfinished and worthless condition. As he was unable to get workmen to finish them, the conspirators were liable to an action for the injury sustained by their employer.

27. The master of a servant who is enticed from his service can maintain an action against the enticer. Even though the relationship between them can be terminated by either at will, this is a sufficient foundation for the action. Again, a master can maintain an action against one who assaults or imprisons his servant, whereby he loses his service. As a master has a right of action against one who maliciously induces his servant to leave him, so an action will lie in favour of a servant against a person who has maliciously induced the master to discharge him from employment.

28. A master is bound by the act of his servant for any injury done by the master's authority. While this general principle is well established, it is extremely difficult to apply it and determine in what cases the servant is deemed authorised by the master.

It may be said that the master's liability depends on the general law of agency, that he is liable for the act of his servant when he has authorised him to act as

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an agent, or has pursued such a course of conduct as to lead persons to believe that he was acting as his agent.

29. The test of a master's responsibility for the act of his servant is, whether the act was done in the transaction of his master's business. When, therefore, he deviates from his instructions, this does not relieve the master from liability for his acts while thus engaged.

Another view of the subject has been taken by the Supreme Court of Ohio. It is declared that "where a person is injured by the act of a servant, done in the course of his employment, we see no good reason why the motive or intention of the servant should operate to discharge the master from liability. If the nature of the injurious act is such as to make the master liable for its consequences in the absence of a particular intention, it is not perceived how the presence of his intention can be held to excuse the master."[1] Thus, it has been repeatedly held that for the act of a conductor or other employee of a railroad train who unlawfully assaults and injures a passenger or even a trespasser, the company is liable, notwithstanding the servant acted wilfully and from personal malicious motives. His conduct is none the less in the course of his employment because of his motive.

The rule would be different if the conductor or brakeman should wilfully and maliciously assault a mere stranger to whom the company owed no duty at all.[2]

[1] Passenger R. v. Young, 21 Ohio St., 518.

[2] A railroad company has been held liable for the consequences of an act of a locomotive engineer in blowing the whistle and allowing steam to escape, whereby horses were frightened in cases where he acted wilfully and maliciously.

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30. The master is also liable after he ratifies the servant's act, whatever it may be. The law seems to be well settled in this regard. The cases are very numerous in which the master becomes clearly liable by thus making an act of his servant his own.

31. Ordinarily a servant is not personally responsible on authorised contracts entered into by him in his master's name. When, however, he makes contracts without disclosing his agency, or exceeds his authority, he is liable and is governed by the general principles of the law of agency applying to such cases.

32. A servant is liable for criminal acts, though his master may have commanded him to commit them. A servant is bound to perform the lawful command of his master, but not those that are unlawful. Such a principle would justify a servant in committing any crime. Even though the servant be ignorant that he is committing an injury, yet if the thing done is an injury, he is liable, though done by the command of his master.[1]

33. For an injury done by a servant, either fraudulently or wrongfully, while in his master's employment, both are liable even though the act may have been done contrary to the master's orders. Again, for an injury resulting from negligence or lack of skill, on the part of the servant, both are liable. Says the court on one of these occasions: "In one sense, where there is no express command by the master, all wrongful acts done by the servant may be said to be beyond

[1] No implication of authority on the part of a railroad station agent to employ third persons to watch the station and catch burglars arises from the fact that he has authority to do such acts himself.

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the scope of the authority given; but the liability of the master is not determined upon any such restricted interpretation of the authority and duty of the servant. If the servant be acting at the time in the course of his master's service, and for his master's benefit, within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master be shown."[1]

34. A person who employs an independent contractor is not liable for his wrongful conduct, or that of his servants who are at work with him. This has been determined on many occasions. Thus, on one of them it was held that a person who employed a public licensed drayman to haul barrels of goods was not liable for injuries inflicted by the latter by rolling a barrel against a person. The owner of land who employs an independent contractor to erect or repair a building on his lot is not liable for injuries resulting from the acts of the contractor's servants, however negligent they may be, whereby others are injured.

35. A different rule applies when the work is unlawfully constructed or creates a public nuisance. In such cases both the contractor and the owner are liable for the resulting injuries. Thus, a person who, without authority to excavate in a highway, employs a contractor to do this for him is liable to any person injured by the excavation, and so is the contractor.

36. Formerly the question was often considered by

[1] Evans v. Davidson, 53 Md., 245, 249.

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the courts concerning the correction a master could exercise over his servants. It is now said that a master who chastises his servant, whether he be an adult or a minor, is guilty of assault and battery, and is liable both in the way of damages and also to a criminal prosecution.

37. A master or servant has a right to defend the other, and either can justify a battery in defense of the other.

38. It is a fundamental rule that a man is not liable for the wrongs done by another. It is, however, no less true that a master is liable for the wrongful or negligent acts of his servant that are done within the scope of his employment and while pursuing his master's business. The various rules in confirmation of this have been already mentioned.

In 1837, however, another principle was announced of far-reaching consequences, namely, that a master was not liable to one of his servants for the injury caused by the neglect of another. The case in which this principle was first declared may be briefly stated. A butcher employed a man, and requested him to go with some goods in a van driven by another servant. The man went as requested, but the van being overloaded, broke down, and the man was thrown off and sustained severe injuries. He sued his master, and the court decided that he was not liable because the injury, of which there was no question, was caused by the negligence of another servant. Lord Abinger, who gave this decision, considered the question at great length, and especially dwelt on the absurdities

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of prescribing a different rule. The courts in this country readily adopted it, perhaps without fully realising the consequences to which its application would lead. No rule of the law has ever given rise to so many difficulties and complications. We shall in as brief space as possible seek to give the principal rules springing from this decision.

39. By this rule an employer is not an insurer against all accidents that may happen to his employees. On entering the service of another one takes on himself, in consideration of the compensation he is to receive, the ordinary risks of the employment, including the negligence of those around him. This is the most general principle that applies between master and servant. An employee assumes by contract the risk attending his employment. The law declares that he knows what he is doing. The immunity of the master rests on the contract of hiring. Says the Supreme Court of New Jersey, putting the words into the mouth of a servant, "You understand fully the nature of the employment and the danger attending it; will you enter it?" The servant says, "I accept it," and the law implies that he accepts with it all the risks incident to it without regard to the magnitude of the dangers.

40. An employee must use ordinary care to avoid injuries to himself. He is under as great obligations to provide for his own safety from such dangers as are known to him, or that may be known by the exercise of ordinary care on his part, as his employer is to provide for his safety.

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41. Though an employee is held to be his own insurer of all ordinary risks, an important rule of duty has long been prescribed for an employer. He must exercise due or ordinary care: first, in selecting servants; second, in supplying them with suitable materials and appliances for their tasks; third, in keeping appliances in repair; fourth, in providing safe places for working; fifth, in furnishing adequate assistance to do the work required; sixth, in giving proper instruction to the youthful or inexperienced workmen. Each of these requirements will be briefly considered.

42. We may begin by inquiring — what is meant by ordinary care? In one of the cases the court thus defined it: A man in any situation of business is always bound to conform to the rules and usages which prudent and careful men have established in the conduct of similar business under similar circumstances; and the rule by which he is to govern his own is that which is established by careful and prudent men in that particular business. The courts have tried to define more precisely the care and diligence that must be exercised by employers. It is evident that the inquiry must always, from its very nature, elude precise answer.

43. Passing from this general statement concerning the exercise of care, we remark that the rule governing employers in the selection of competent employees is the exercise of reasonable care and diligence in providing them with safe machinery and careful rules and in employing them with fit and

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competent fellow-servants and competent foremen. Says Justice Sharswood: "What is due care and ordinary diligence will much depend on the kind of business which is carried on and the sort of material which is handled. The proprietor of a powder mill must exercise more precaution than the master of a blacksmith shop."

(*a*) In employing this rule there is a difficulty, for all employers have not the same mind concerning the facts relating to one's competency. In one of the cases the Supreme Court of Missouri remarked that it was the duty of the company's officers to employ proper servants, but the duty was not an absolute one. If they made careful inquiry into the habits and competency of the men employed, and upon such inquiry believed them to be sober and competent and careful, the officers could do no more.

(*b*) The law presumes that an employer has selected competent employees, and, having done so, may rely on their competency until he learns of their unfitness. The burden of proof of incompetency is on the party who makes the charge. He must show that the employer knew, or would have known, had he shown proper care and diligence, of his servant's incompetency.

(*c*) Nevertheless, though an employee is competent or fit for his employer's service when hiring him, and no presumption of unfitness afterward arises, yet the master cannot shut his eyes nor his ears and rest in peaceful security unconscious of what may take place thereafter.

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(*d*) Very often a master cannot hire personally his employees, and acts through the agency of another. The person to whom the master's duty is thus delegated, no matter what his rank or grade may be, cannot be a servant, but is regarded as an agent of the principal himself. The consequences flowing from this rule is, if the servant is negligent in performing his agency, his principal is liable in just the same manner and to just the same degree as he would be had he performed the service himself.

44. The selection and use of appliances will next be considered. This term includes machinery of every kind and also the operators. The term, therefore, in this connection has a broad significance. Thus, a railroad in transporting employees over its track to and from their place of work, uses the track as an appliance which must be suitable for the purpose, while a track in process of construction is not so regarded. Says Chief Justice Bigelow: "The employer may make a contract that he will use due care in engaging the services of those who are usually fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such machines, apparatus, tools, appliances and means as are suitable and proper for the prosecution of the business in which his servants are engaged, with a reasonable degree of safety to life and security against injury." Elsewhere he remarked, "a workman or servant on entering any employment is supposed to know and to assume the risks naturally incident thereto; if

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he is to work in conjunction with others he must know that the carelessness or negligence of one of his fellow-servants may be productive of injury to himself, and besides this, what is more material as affecting his right to look to his employer for damages for such injuries. He knows, or ought to know, that no amount of care or diligence by his master or employer can by any possibility prevent the want of due care or caution in his fellow-servants, although they have been reasonably fit for the services in which they are engaged." [1]

(*a*) In providing suitable appliances it is not always needful to provide the newest or those that will protect employees the most completely from accident. Says Justice Danforth, a master is not bound to furnish the best of known appliances. He is required to furnish such as are reasonably safe, and to see that there is no defect in those which his employee must use. [2]

(*b*) We may add one more extract from a recent case in its application to a railroad company: It is not required to change its machine in order to apply every new invention or supposed improvement in appliances, and it may even have in use a machine or appliance for operation shown to be less safe than another in use, without being liable to its employees for the non-adoption of improvements, provided that the employee be not deceived as to the degree of the danger that he incurs.

[1] Snow v. Housatonic R. R., 8 Allen, 445.
[2] Gottlieb v. Railroad, 100 N. Y., 462.

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This rule has been applied on many occasions to all kinds of machines, but no further light can be given by multiplying illustrations.[1]

(*c*) If it be an employer's duty to furnish suitable appliances for the use of his men in the beginning, this duty is continuing. Says the Supreme Court of Maine: "The same care required in hiring his servant in the first place must still be exercised in continuing him in his service; otherwise the employer will become responsible for his want of care or skill. The employer will be equally liable for the acts of an incompetent or careless servant whom he continued in his employment after the knowledge of such incompetency and carelessness as when in the exercise of due care he should have known it, as if he had been wanting in some care in hiring. The same may be very properly said of machinery."[2]

45 (*a*) An employer who provides his servants with safe tools and machinery does not promise or engage that they will always remain in the same condition, and any defect that appears from their use the servant should report to the employer.

(*b*) An employee who continues to use appliances

[1] "Although it is not negligence or a breach of legal duty for a master to hire men to work on an old machine, merely because there are newer and safer ones in use, yet many of the courts of this country hold that a master is always bound to keep pace with new inventions in the direction of safety. But this rule is an exceptional one, established upon grounds of public policy and safety of human life. It has never been applied to the relation of master and servant. The ordinary rule is that the workman takes the risk incident to his employment. Such are the words of Judge Brown, and they are doubtless a correct statement of the law, but why should the law have more regard for the lives of passengers on a railway than for the lives of its workmen? Are not the latter in quite as helpless condition as the former? Ought not public policy to require railroads to adopt every important safety device for the benefit of their workmen as well as the public?" The Maharajah, 40 Fed., 785.

[2] Shanny v. Androscoggin Mills, 66 Me., 420, 425.

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or machines that have become impaired, without complaint, stands in the same position as one who knowingly undertakes his employment in the beginning and assumes the increased risk. On the other hand, an employer is liable to employees who know nothing of the greater danger in the same degree as he would be if he equipped his mill or other plant with unfit appliances in the beginning.

(*c*) This principle of liability does not apply to defects arising in the daily use of appliances which do not require the aid of skilled mechanics to repair. These, workmen usually repair themselves, and the law casts no liability on the employer for them.

(*d*) Furthermore, the employees of a master who has a machinist to whom they are required to report when repairs are needful, cannot recover for an injury caused by making repairs themselves.

(*e*) Again, an employer is not at fault for the breaking of a tool or machine whether from an internal fault not apparent when the tool or machine was at first provided, or from an external apparent one produced by time and use, which was not made known to the employer.

(*f*) A different rule applies to perishable appliances. The employer knows that they will last only a little time, and it is his duty to renew them at proper intervals. This principle applies especially to the use of ropes and similar things which are constantly wearing out from using them.

46. Next may be considered an employer's duty to make inspections. An employer is required by

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the rule to furnish safe appliances. This also requires or implies that he must inspect them before they are put into use. This duty, however, is somewhat modified in the different states and by different courts. Says the supreme federal tribunal: It is not necessarily the duty of a purchaser of machinery, whether simple or complicated, to tear it to pieces to see whether there be some defect. If he purchase it from a manufacturer of recognised standing he is justified in assuming that in the manufacture proper care was taken and that proper tests were made of the different parts of the machine, and that as delivered to him it is in a fair and reasonable condition for use.

We cannot hold, says the Supreme Court of Georgia, that an employer is liable to his servant when he furnishes him with an axe, a wagon, a saw, a hammer or any other tool which appears to be first class, and which by some latent defect breaks and injures the servant. If such was the law every farmer, carpenter, or other employer would be liable to his employee when he furnished him with tools and they broke and injured him on account of some latent defect which could not be ascertained by the exercise of ordinary care.

The servant of a railroad company in inspecting its own cars has a primary duty to perform, as clearly as in selecting competent servants and suitable appliances and machinery. Thus acting, he is not a fellow-servant with the servants around him, but is a representative of a company which, consequently, is liable for his negligence.

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Another rule applies to the inspection of foreign cars. Cars may be perfectly adapted to one road, but imperfectly adapted to another by reason of a different coupling appliance, or of greater height by which they can be coupled only with great difficulty, or by reason of using an unusual coupling. A foreign car that is not in good condition need not be received by another road. To this rule all the courts agree.

A road in receiving a car in good condition is bound by the same rule that applies to the inspection of its own cars.

47. An employer must provide a suitable place for his employees while at work. Evidently the nature of the place will vary greatly with the work to be done. A safe mill means a very different thing from a safe coal mine or railroad. The same rule applies to a railroad company as to any other employer, but the application is more difficult because a railroad is such a complicated thing.

(*a*) In applying this rule to a railroad company that has built overhead bridges so low that those who are engaged on the top of the cars must stoop when passing them to prevent accident, several rules have been established. One is that a railroad company is not required to build such bridges high enough for a man to stand upright on top of a car. In some states the rule is otherwise, and a bridge thus constructed is an improper one.

Although a bridge may be unsuitable or defective in character, yet an employee who knew of its existence, or was properly warned of its location and of

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the danger, cannot recover for an injury caused thereby, for then he assumes the risk; otherwise he can recover.

(*b*) The same rules apply generally in placing tanks, cattle chutes and other structures so near the track as to endanger the lives of employees. It is negligence to build or keep them there, yet those who know of their existence or who have fair warning of their danger and remain in the service have no cause of complaint if they are injured.

(*c*) When a scaffold is regarded as a place the same rule applies to it as to any other place for working; it must necessarily be safe. When it is regarded as an appliance then it may be considered in a double aspect. Under one aspect the master is bound by the same rule that applies to every other appliance. It must be reasonably safe. Under the other aspect he is bound only for the materials entering into its composition. These must be reasonably safe. In using them, however, the men are regarded as fellow-employees the same as when doing any other kind of work, and their master is not liable for their negligence unless he was negligent in the beginning in selecting them. Whether a scaffold that is to be built must be regarded as an appliance which an employer is required to furnish, or whether it is simply a piece of work for which the employer is responsible only for the furnishing of suitable material and competent men for putting together, is a question decided in different ways by the various courts of the Union. It is unfortunate that such an important question

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should not have received a uniform construction. In a few states the question has been settled by statute.

48. An employer must supply his servant with adequate help, not only in quality but in quantity; whether he has done so is a question of fact.

49. Next may be considered the duty of an employer to inform his servants concerning the use and danger of the appliances. The most general rule is that he must make proper rules and give them due publicity.

(*a*) Not every business requires the making and formulating of rules, but a railroad, factory, mine — where many persons are employed, and the dangers are considerable — should make and promulgate such rules as will give reasonable protection to its employees.

(*b*) In many cases they well know that regulations exist, and when they do it is their duty to read them. This is especially true of railroads. Consequently, if they do not know the regulations, the fault is theirs.

(*c*) To permit an employee to disregard a rule is in effect the same thing as to use defective machinery. Says the New York Court of Appeals: No distinction exists in principle between permitting the use of defective machinery and permitting the employees to habitually disregard the safeguards that have been provided to insure the safe running of trains.

(*d*) An employee who has disobeyed a particular order or rule should be discharged; not to do this is negligence. Thus, a company was notified that its employees gave the control of its engines to firemen,

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in direct violation of its orders. Clearly the company should have discharged them after having received such notice. In many cases of frequent disregard of rules the master is considered as having acquiesced in their violation.

(*e*) An employee cannot ordinarily dispute the reasonableness of a rule or regulation. But he is not required to comply with a rule at the peril of his life, nor to perform an act which he knows is unlawful.

(*f*) Whether an employer ought to make a particular rule or set of rules for the instruction of his men is a question for the decision of the court and not the jury. So also is the question whether a rule is reasonable or not. It is a question of law and not of fact.

50. The law imposes a grave duty on employers in making rules and regulations for minors or inexperienced persons. The duty varies with the child's age and capacity. A very good statement of the law is given in a recent decision by the Supreme Court of Pennsylvania. When young persons are employed to work at dangerous machines it is the duty of the employer to give suitable instructions as to the manner of using them and warning as to the hazard of carelessness in their use. If an employer neglected his duty, or if he gave improper instructions, he is responsible for injuries resulting from his neglect of duty. He is not answerable for injury to adults, nor for injuries to young persons who have had that experience from which knowledge of danger may reasonably be presumed and that discretion which promotes care.

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A different rule applies to a child that knows of the danger. An employer is not required to instruct him, and consequently is not liable for not doing so. Again, a minor who has been instructed or warned of a particular danger and undertakes the employment is liable like any other employee.

(*a*) A person who assumes a risk on the promise of his master that he shall thereafter be instructed in his employment, and is injured through his master's neglect to give instruction, can recover from his employer.

(*b*) The fact that the injured employee is a minor does not affect his legal rights. A minor who goes into service with the consent of his father is lawfully employed; he has the same right that any other employee has and no more, and the employer is under the same liability to him as to other workmen.

51. Especially should an employer not expose an inexperienced servant without giving him such warning as will enable him to avoid injury, unless both danger and the means of avoiding it while he is performing the service are apparent. Says the Supreme Court of California: There is no doubt that if an employer has knowledge or information showing that a particular employment is free from extraneous causes known to him to be hazardous or dangerous to a degree beyond that which it fairly imposes or is known by his employee to be, he is bound to inform the latter of the fact. Besides, a service not dangerous in the beginning may be increased while serving. In such a case it is the duty of the master to inform the serv-

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ant of the increased danger or hazard, unless it is so apparent that he ought to take notice of it himself.

52. The assumption of risk by an employee has been stretched to cover another class of cases in which an employee is required to perform other duties more dangerous and more complicated than those undertaken in the original hiring. If these were undertaken knowing their dangerous character, the risk is assumed, and there can be no recovery for an injury received while executing them. He may not, and doubtless does not, receive any greater reward for assuming the greater risk; on the other hand, it is assumed rather than lose his place. Thus, in one of the cases the person injured was aiding as fireman on an engine and knew that this duty was not in his ordinary contract as labourer. He determined to perform it as a part of his engagement with the company rather than lose his position. In so doing he was regarded as assuming the risk of his employment.

(*a*) This is not the rule in all states. In Indiana the court has declared that the servant's implied assumption of risk is confined to the particular work or class of work for which he is employed. Consequently, a master is liable who puts his servant at work outside of his employment, and is injured by reason of defective machinery without his fault.

(*b*) There is a qualification to this rule. The master will not be liable if the circumstances are such as to show that the servant is competent to apprehend the danger and expressly or implicitly assumes the risk; or that his knowledge of the danger was

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equal to that of his master. Thus, in one of the cases a common labourer was temporarily employed in performing a hazardous service, the nature of which he did not understand, though consenting to perform it. This did not defeat his right to recover, for he did not understand the risk that he was incurring. Had he understood the danger the master would not have been liable.

(*c*) If an employee undertakes a temporary service at the request of another fellow-servant, or from one having no authority from the master, then the master cannot be held liable for the consequences, however serious or well intended the servants may have been.

53. As we have seen, an employee assumes all the natural risks and perils incident to the service. The law presumes either rightly or otherwise that the risks are considered in adjusting the amount of the compensation that he should receive. An employee, however, may assume other risks beside natural ones, unusual or extraordinary risks. To these there is hardly any limit. A machine may be exceedingly dangerous and difficult to run, but if the danger is known to an employee no deception is used; if he comprehends or ought to comprehend the business and the peril, and undertakes to operate the machine, he assumes the risk.

The Supreme Court of New Jersey has thus stated the principle: Where one enters upon a service he assumes to understand and takes all the ordinary risks that are incident to the employment, and if

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these present special features of danger which are plain and obvious he also assumes the risk of these.

Another rule nearly similar may be stated in this connection. Notwithstanding the general rule that a master is bound to furnish safe and sound materials, etc., yet if the work upon which the servant is employed consists, in whole or in part, of handling unsafe or unsound things, knowingly, and which, by the very nature of the business must be handled while in that condition, the servant assumes the risk. Thus, a railroad employee hired to remove damaged cars to the repair shop has no right to complain of injuries suffered from known defects.

It will be noticed that the risk here assumed is not one growing out of the negligence of employee or employer. Cars become injured, and it is needful to remove them, and in so doing a risk greater than the ordinary daily risk is incurred. The employer is not negligent in seeking to have the cars removed. He would be if he did not direct this to be done. As he is not negligent in securing their removal, neither is the employee negligent who undertakes to do the work. The risks are of daily occurrence that fall under this rule.

54. The first great invasion of the rule we have been describing, defining the duties of employers, is an employee who, besides assuming the ordinary and natural risks of his employment, also assumes such risks as are, or ought to be, apparent to him by ordinary observation. In other words, such risks as are readily discernible by a person of mature age and

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capacity in the exercise of ordinary care. Thus, a person was employed to run an old machine, but he knew as much about it and the risks attending its use as his master. The court declared that the latter could not be required to provide himself with other machinery or other appliances. The general rule is, a servant who accepts a service assumes the risks incident to it; and where the machinery and implements of the employer's business are at that time of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards.

"Every employer," says Justice Foster, "has a right to judge for himself in what manner he will carry on his business, as between himself and his employees, and a servant having knowledge of the circumstances must judge for himself whether he will enter his service or, having entered, whether he will remain."

55. A servant who simply knows that a machine is defective, but does not comprehend the risk, does not assume it. It is one thing, says Justice Mitchell, to be aware that a machine is defective, or in a particular condition, and another thing to know or appreciate the risks resulting therefrom. A man of ordinary intelligence may know the condition of the instrument with which he is working, and yet not know the nature and extent of the risks to which he is exposed.

Again, an employee who proceeds to work, though knowing of a defect in a machine or appliance, on the

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assurance given by the employer that it is safe to do so, may hold him liable for the consequences.

56. An employee who is exposed to actual peril known to the employer, but not to the employee, does not assume it. Thus, in one of the earlier cases an accident happened to an employee from a defect in the floor, which was known to the employer, but not to the employee; the employer was held liable.

Furthermore, if a place becomes defective in any way, less secure or more dangerous to the workman and he does not know this and continues his employment, his employer is liable for the consequences. In such a case it would be unreasonable to suppose that the employee would be willing to assume the risk; indeed, in one sense it would be impossible for him to assume a risk of which he had no knowledge.

57. If the defects in a machine or appliance are as well known to the employee as to the employer, the former must be regarded as voluntarily incurring the risk resulting from its use unless the employer by urging the servant or coercing him into danger, or in some other way directly contributes to the injury.

58. What then is left of the rule requiring suitable appliances, etc.? The fragment of responsibility still remaining is to make known dangers to employees unless they know them, or they are such as may be known by ordinary observation. If they are then the employee assumes them and the employer is relieved of all liability.

59. Employers may also be relieved of liability for defects or imperfections afterward discovered by

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their employees if they continue at their place of service. Thus, an employer knowingly hires an incompetent servant, whose incompetency is discovered by the other servants who are at work with him. Should they afterward continue to work with him and give no notice of their discovery to their master, or to anyone authorised to act for him, no one of them could recover anything for an injury caused by the incompetent servant. In other words, the servants thus knowingly working with an incompetent servant assume the risk, though in fact it was no greater after their discovery than before.

This invasion of the rule is in harmony with the invasion already noted concerning the use of dangerous appliances and working in dangerous places. If the machine is defective the employee need not attempt to manage it. Surely, the courts say, he is not obliged to hire himself out under such circumstances. In like manner, if it becomes defective and he is afraid of injury, he may quit, and the courts say that he is justified in doing so. But if he continues his employment it is his own affair, he runs the risk, and if he is injured cannot complain.

60. A servant who, knowing that the machine he is operating is so defective as to render its use dangerous, simply protests against its use, and after protesting receives no assurance that the defect will be remedied, and continues to use it, assumes the risk, for his remaining in the service is voluntary.

61. An employer who has been notified of the incompetency of a servant, or of a defective appliance,

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has a reasonable time to investigate the truth of the notice before acting. He is not required, if a charge is made of the incompetency of a servant, to discharge him instantly on receiving the notice. The notice must be given to the employer, or to his representative. This rule is imperative.

62. If an appliance or place has become defective or the co-employee has proved himself to be incompetent, and the employer, after knowledge of his discovery, promises to repair the defect or discharge the employee, and his other employees continue to expose themselves to the newly discovered danger by reason of the master's promise, in most states he is responsible for any injury happening to them afterward, springing from the discovered defect. This is a reasonable rule. In such cases the employee does not assume the increased risk; the master virtually says to him, "Continue to work and if you are injured I will bear the loss." The law presumes that the employee would not continue to work except for his master's promise to lessen or remove the risk.

63. If, however, the defect be very serious the employer has been relieved from his promise to repair on the ground that the employee ought not to have assumed the risk anyhow, that he was unwise in so doing and ought to be punished by shutting off all chance of recovery. This is not the rule everywhere.

64. If an employer promises to repair the defect the employee can recover for the injury caused thereby within a reasonable period of time after the promise

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to allow for its performance. This statement of the law is made by the highest federal tribunal.

The employer does not long remain an insurer of the risk after his promise to remove it; only for a reasonable length of time. After the time has passed, and the employer has done little or nothing to remedy the defect, the employee must quit, or, should he continue to work, assumes the risk himself. This may seem to be hard law, but in most states it is the law.

65. Finally we come to the question — who are fellow-servants? The decisions are a hopeless jumble, and it is extremely difficult to establish any rules stamped with general approval. One or two, however, may be mentioned. When a master delegates to another the performance of a duty which rests absolutely on himself, the master is liable for the proper execution of the duty. The employee's rank, whether he is above or on the same level as that of the other employees, does not affect the master's liability.

Again, a person who represents his master, fully taking charge of his entire business, is not under any circumstances a fellow-servant with other employees.

A third rule may be stated. The directors, president and superintendent of a company are not fellow-servants. Perhaps other officers, says Justice Brewer, may be included, but these certainly are not fellow-employees.

Such are the principal rules governing the relation between master and servant on this vastly important subject. In consequence of the numerous decisions

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and their conicting character in England they have been nearly all swept away by statute. Massachusetts has led in sweeping away many that were established by the tribunals of that state. In all of the states there is a marked tendency to modify or sweep away many of the rules that we have stated in the foregoing pages by reason of the difficulty in applying them.

We stated at the outset of our work that it was the duty of everybody to know the law, and consequently all are held amenable for its infraction; but what shall be said of those important legal relations between employers and employees over the existence of which even the courts themselves are so hopelessly divided?

Notwithstanding the statutes abolishing the so-called fellow servant rule, questions are constantly arising about their meaning and application. Thus in Arkansas the act, abolishing the application of the fellow servant rule to railroads, applies to a member of a railroad bridge crew unloading piles from a car. In Michigan, a similar act relating to railroad employees, does not apply to a repair shop employee of a railroad company who was injured while waiting to oil a locomotive outside the shop in the course of his duty. In Indiana, where the fellow servant rule has been abolished, a factory worker assumes no risk in working with unguarded machinery that is dangerous and could be properly guarded. More broadly, the abolition of the rule transfers to the employer the risks which the common law regarded as assumed by the servant.

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CHAPTER XVI

WRONGS

1. Contracts sometimes prescribe the sum to be paid for non-fulfilment.
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3. An attempt with unlawful force is an assault.
4. When deception is equivalent to an assault.
5. When assault becomes a battery.
6. Accidental injury is not a battery.
7. Attempt to commit a battery may be resisted.
8. Words do not justify the employment of force in self-protection.
9. One may use force in protecting a member of his family.
10. Use of force to defend property.
11. Use of spring guns and similar devices.
12. Punishment by school teacher.
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1. VERY often a contrast prescribes the damage or penalty that may be visited upon the violator. This

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usually consists of the payment of a sum of money, or the restitution of the property, or both.

2. The wrongs to be considered in this chapter include a large number outside the field of express contracts. By fundamental law every person is entitled to liberty, security of life, and the security and restitution of his property.[1] Thus, a person has a right to complete immunity from harm. An attempt to commit a battery often puts a person in fear, and this is an assault and a wrong, even though not followed by an actual battery. But a threat to commit an injury, though sometimes a criminal one, is not an actionable private wrong. In other words, mere words do not constitute an assault.

3. Any attempt with unlawful force to inflict injury on another with apparent ability to make it effectual, if not prevented, is an assault. The raising of the hand with the apparent purpose to strike, the pointing of a pistol at a person within range of fire, are illustrations of assault.

4. Deception may sometimes be equivalent to force in an assault; for example, to put an explosive into one's hand without knowledge on his part of its nature, or to conceal a posionous drug in one's food.

5. A successful assault becomes a battery when the injury is actually done to a person in an angry, revengeful, rude or insolent manner. The wrong con-

[1] While the state may restrict its own right, it cannot take away the rights that are purely individual; even these are closely associated with the public right. Thus, no regulations of the right of navigation can lawfully take from a riparian proprietor his waterfront and the right to make use of it for the purpose of navigation. Again, no special privilege to make use of public waters can empower the beneficiaries to flood the lands of individuals.

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sists not so much in actually touching the person as in the manner and spirit of doing the act. Thus, to push gently against another in going through a crowd is not a battery; an insolent push would be.

6. An accidental injury is not a battery. On the other hand, the precise injury may be different from the one designed. The illustration often given is the throwing by mere recklessness of a missile into a crowd; a stricken person may have an action for the injury. Again, a blow unlawfully aimed at one person will give the right of action to another upon whom it may fall, though not intended. Another illustration, more frequent a year or two since than now, was that of the bicycle rider who carelessly ran against a pedestrian; this was an assault.

7. An attempt to commit a battery may always be resisted, with the restriction that no more force must be employed than is needful to make one's self-defense effective. He must not inflict serious injury in repelling an attack which threatens him with slight injury. He must not take life or limb unless his own life or limb is in danger; not even then if he can safely retreat from danger.

8. As words do not constitute an assault, they do not justify the employment of force for self-protection. Words grossly insulting to a woman, or spoken in the presence of one's family for the purpose of aggravating them, may constitute a breach of the peace to such an extent as to justify one in employing force to put an immediate stop to the brutal talker.

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9. Again, such force as one may use in his own defense may be used in defending any other member of his family. But this right does not go so far as to admit of taking revenge for a past wrong. For this, however slow the remedy may be, the injured person must invoke the law.[1]

10. An assault and battery in defense of property may be justified; the invader of one's property may be removed by force. This must be limited to the amount needful for the purpose. Again, force cannot be employed to recover a thing in another's possession, save in extreme cases.

11. To set a spring gun or similar device as a defense against trespassers, though not unlawful, might result in serious consequences were the trespasser seriously injured. The force might prove excessive, and subject the user to an action. The same principle applies in keeping a dog that is known to be ferocious, or in using means that are likely to inflict serious injuries without warning, as a defence against mere trespassers.

12. The reasonable punishment of a scholar by his teacher is proper for the preservation of order and discipline. In one of the recent cases the court thus set forth the law on this subject: A school teacher has the right to require obedience to reasonable rules, and proper attention to his authority, and to inflict punishment for disobedience.

In the absence of rules established by the school board or other proper authority, a teacher has a right

[1] See § 99 of this chapter.

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to make all necessary and proper rules for the regulation of the school.

In inflicting corporal punishment the teacher must be governed by the nature of the obedience and by the age, size and physical condition of the pupil.

In punishing a boy who has been habitually refractory and disobedient, for a particular disobedience, the teacher must take into consideration his habitual disobedience. But he need not inform the pupil at the time that he is punishing him for past as well as present misconduct.

In an early and leading case on this subject the court declared that the welfare of the child is the main purpose for which pain is permitted to be inflicted. Any punishment, therefore, which may seriously endanger life, limb or health, or shall disfigure the child, or cause permanent injury, is immoderate, and inconsistent with the purpose for which it is authorised. But any correction which produces temporary pain only, and no permanent ill, is not immoderate, since it may have been necessary for the reformation of the child. When the correction is administered, and is not immoderate, and therefore not beyond the authority of the teacher, its legality or illegality must depend entirely on the *quo animo* with which it was administered. Within the sphere of his authority the master is the judge of the occasion requiring correction, and of the degree of correction necessary. When imparted with discretion he cannot be made responsible for an error in judgment, but only for wickedness of purpose.

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The chastisement must not exceed the limit of moderate correction, and though courts are bound, with a view to the maintenance of necessary order and decorum in schools, to look with reasonable indulgence on the exercise of this right, yet correction clearly excessive and cruel must be adjudged illegal. Nor is the master relieved from liability in damages for the excessive and unnecessary punishment of a scholar by the fact that he acted in good faith and without malice, both for the discipline of the school and the welfare of the scholar.

Whether the punishment in any particular case was excessive must be left for the jury to decide. "Any punishment with a rod which leaves marks or welts on the person of the pupil for two months afterward, or much less time, is immoderate and excessive, and a court would be justified in so instructing the jury." The pupil must also understand, and know, or have the means of knowing, for what offence he is punished.[1]

13. The law secures to every person his reputation. Every false charge or insinuation made maliciously and causing injury to one's reputation is actionable. Furthermore, after the introduction of proof of publication, the burden of proof is generally thrown on the accuser. Every person is assumed to be of good reputation until the contrary is shown. Again, the charges or insinuations against him are assumed to be false. Attending this presumption is another that they were maliciously made. Lastly, when the

[1] 25 *Central Law Journal*, pp. 339–344, Heritage v. Dodge, 64 N. H., 295.

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natural effect is to cause injury, the law presumes this to have followed.

A person may sometimes have a bad reputation which is deserved, yet he may be wronged; thus, one may be charged as a thief who is only a vagabond. But a person is not wronged whose undeserved good reputation is destroyed by exposure.

14. A defamation is a false imputation on one's character or reputation in the way of slander or libel.

(*a*) Slander is defamation published orally or in like manner.

(*b*) Libel is defamation published by writing, printing or figure.

(*c*) The imputation may be made upon one as a man, or upon one in his vocation. Language that is spoken, or that is defamatory, is understood to be false.

15. In interpreting language its natural sense is regarded. It is not be to construed in a milder sense, though this may be possible. Such a construction would be forced, and the law does not put a forced construction ordinarily upon it.

16. Defamation is published when one makes an imputation to, or in the presence of, another, or causes the statement to come to the notice of another. Publication made without authority is published only by the one making it.

17. Publication means the presence of someone who understands the language used. Says Bigelow: The damage complained of must, in all cases, have been

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sustained through the action of a third person. In no other way is it actionable.[1]

18. Spoken words as a cause of action have been classified as follows: (1) Words falsely spoken of a person which impute to the party the commission of some criminal offence involving moral turpitude for which the party, if the charge is true, may be indicted and punished. (2) Words falsely spoken of a person which impute that the party is infected with some infectious disease, which, if the charge is true, would exclude the party from society. (3) Defamatory words spoken of a party which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

19. Different rules prevail in the different states concerning the imputation of an offense. In some states, unless the offence charged is indictable, involves moral turpitude, or is infamous, there is no right of action against the utterer without proof of special damage.

20. A punishment is infamous at common law which disqualifies the offender from acting as a witness in the courts, but a trivial offense, such as vagrancy, begging, fortune-telling, and the like, is not infamous.

[1] § 294, p. 154 (Seventh Edition).

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In such a case, therefore, there can be no action against the person who has uttered it without proof that he has sustained special damage.

This is not the law everywhere. In some of the states an action may lie for an offense which is punishable and disgraceful. Thus, Bigelow says: "Whenever a punishable offence has been charged, which, though not ignominious, would bring disgrace, the accusation, if false, is actionable per se; the offence need not be indictable." [1]

21. An imputation to affect a man injuriously and be actionable should have a natural tendency to harm him in his occupation. That it may possibly injure him is not enough. Thus, a defendant published of a plaintiff who was clerk in a gas-light company: "You are a disgrace to the town, unfit to hold your situation for your conduct with bad persons." The plaintiff could not recover without proving actual damage, as the language did not have the tendency to cause the plaintiff's discharge from his employment. Had he been discharged in consequence, though the statement was not correct, he could have recovered damage.

22. Defamation has a natural tendency to injure a person in his office or business when it strikes at his qualification for performing his duties, or declares some misconduct or negligence in the course of transacting his duties, or alleges business embarrassment, or want of credit in the case of a merchant. Thus, should one declare a clergyman to be a swindler, or a lawyer a dunce, these would be actionable words.

[1] § 298, p. 256.

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23. Words that tend to impeach the present title of a person, though regarded as slanderous, are governed by special rules. As cases of action for defamation of this kind are rare, they need not be considered.

24. The law of libel is broader than that of slander. Many words that are written or printed become actionable in themselves which, orally published, would not be actionable without proof of special injury to the person against whom they were uttered. There is a whole class of defamatory representations by figure and effigy which are incapable of oral publication. Thus, a person who writes and publishes the following: "I sincerely abhor the man that can so far forget what is due, not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically and with the grossest impunity deals out his malice, uncharitableness and falsehood," is guilty of a libel.

25. At common law, for the proprietors of books and newspapers, there is no immunity. They are liable for the publication of libelous matter, though made without their knowledge, or even against their orders. This is not true of news vendors. If an alleged libel were of such a nature that a man of common intelligence could not know that it was intended for a libel, and it was not in fact thus known, neither the editor nor the proprietor of the printing establishment nor of the print would be liable.

26. The truth of the charge, unless a statute prevails to the contrary, is a defence to an action for damages

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for the publication of an alleged defamation, though it was malicious and not reasonably believed to be true. A person has no right to a false character, and his real character suffers no damage which the law recognises from speaking the truth.

27. This rule goes so far as to justify one in publishing of another the fact that he suffered the penalty of the law for committing crime, even though he may have been pardoned, and has since lived the life of a respectable citizen. Thus, a newspaper published a statement concerning another that he had several years ago stolen an axe. This was true, though after a conviction the thief was pardoned and blossomed into a trusted citizen and an office holder. Since he had actually been convicted, the law justified the statement.

The truth of an effigy, figure or sign, so far as it may relate to the physical person of the party intended and not to his character, is no justification of a malicious publication. As Bigelow says: "A man is not responsible for his physical peculiarities, and may well invoke the protection of the law against one who may parade them before the public."

28. Belief in the truth of an accusation is not a defense; this, though, may be shown in mitigating or lessening the damages.

29. There are many occasions on which communications are said to be privileged to which different principles apply. Privileged communications are of two kinds. Those absolutely privileged, others which are prima facie privileged.

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30. An absolute privilege cannot be overturned by any evidence that the publication was made with malice. A prima facie privileged communication may be overturned by such evidence.

31. Absolute privilege is confined to the three departments of state — legislative, executive, and judicial — and is justified on the ground of necessity.

(*a*) Whatever is said orally or in writing in the course of judicial proceedings is deemed to be a privileged communication. For example, a counsel for a criminal in the course of his argument may make base insinuations against the prosecutor which would be actionable were they not privileged. A witness on the stand volunteers a statement in vindication of himself, containing a charge of crime against a stranger to the trial. This charge is not actionable. Formerly the relevancy of such a charge was not regarded as absolutely privileged unless it was legally relevant to the matter before the court. This doctrine has of late years, especially in this country, been set aside.

This privilege extends to affidavits made in the course of a trial, and to many other matters connected with the trial itself. The law has been thus generalised by an eminent English writer: "No action, either for slander or for libel, can be maintained against a judge, magistrate or any person sitting in any capacity over any court — judiciary, military or naval — recognised by the constitution according to law, nor against suitors, prosecutors, counsel or jurors for anything said or done relative to the matter in hand in the

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ordinary course of judicial proceedings, investigation or inquiry, civil or criminal in such trial, however false it may be."[1]

The proceedings of the courts of justice with some exceptions are under the eye of the public, even though attended by only a very few, and it is proper that their proceedings should be made known generally. Accordingly the publication of proceedings in open court, if sufficiently full to give a just and correct impression of them and are not attended with defamatory comments, is prima facie privileged. If given in a form so incomplete as to give a wrong impression, or they are followed by comments containing defamatory matter, the privilege fails and the publishing editor and authority is liable for defamation.

The publication of a fairly abridged report of a trial, conveying a just impression of what took place and without objectionable comments, is privileged.

The objection to defamatory comments also applies to the heading of a report. For example, should a newspaper print a report of a trial against an attorney, and head the same, "Shameful conduct of an attorney," the publication would not be privileged. The editor may use a heading properly indicating the nature of the trial, not embodying or implying a comment.

The privilege appears to extend in England to the publication of ex parte judicial proceedings. It also protects the publication of preliminary and final proceedings in open court.

[1] Starkie, cited by Bigelow, § 325, p. 167.

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(*b*) The same privilege applies to the proceedings of the Legislature. The occasion is regarded as an absolute justification for the use of language, which otherwise would be actionable, while relating to legislative business. No member of such a body is liable legally for anything said by him in transacting the public business, however offensive it may be to the feelings or reputation of another.

This privilege is absolute only within the walls of the House, or within rooms occupied by its committees. It is not personal, but local. A member, therefore, who slanders or libels another outside such locality is just as guilty as any other individual.

(*c*) The same principle applies to persons who present a petition to the Legislature.[1]

32. It is obviously to the advantage of the public that true accounts of legislative proceedings should be placed before the people. On this principle, therefore, the publication of such proceedings by anyone is privileged, though they contain defamatory matter, but this privilege does not cover non-official publications.

33. No privilege is conferred, apart from statute, on the proprietors, editors or publishers of public prints for the publication of defamatory matter uttered in public meetings, even though they are held under legal authority. Thus, should a newspaper print an account of a public meeting of commissioners of a town, and the report be fair and truthful, yet if de-

[1] Communications made to the proper public authorities seeking for redress of wrongs fall within the same kind of absolute privilege.

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famatory language were uttered concerning a person at the meeting, the newspaper would be liable for publishing it. The case is not one of privilege, even though the defamatory statement relate to a matter of great interest to the public.

34. On other occasions there is only a prima facie privilege. Proceedings before large organisations, societies, clubs, and other volunteer bodies especially may be mentioned. The proceedings of such bodies for the discipline of their members partake somewhat of the nature of trials. Generally, language used in conducting them is privileged prima facie, so far as it is pertinent to the matter under consideration. For example, a defendant, while on trial before a committee for alleged falsehood and dishonesty in business, says of a plaintiff: "I discharged him for being dishonest, for stealing." He is not liable in the absence of evidence that he was actuated by express malice.

35. The use of public prints is sometimes justifiable to protect a person against the fraud or attack of a private citizen. Thus, a baker, employing servants in delivering bread in certain towns, inserted in a newspaper published in one of the towns a card stating that A having left his employ, and taken on himself the privilege of collecting his bills, this was to give notice that he had nothing further to do with his business. This was a legal and justifiable step.

36. Honest statements made to the public in vindication of character publicly attacked are privileged prima facie when made through the proper

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channel. Thus, B published in a newspaper a reflection on A's character, who in reply published an article assaulting B's character. The defense was acting honestly in defending himself and his communication was prima facie privileged.

37. Communications by a master in regard to the character or conduct of his servant to a neighbour who is thinking of employing him fall within this category. Thus, a person having discharged his servant for misconduct and learning that another is about to engage him, writes to inform him that he has been discharged for dishonesty, and that he cannot recommend him. The charge of dishonesty is false, but is believed by the other to be true. The writer has a prima facie right to make such a statement.

The same principle applies in communicating with a very near relation. Thus, a partner may advise a co-partner to have no partnership dealing with another on the ground that he is a thief.

In most of these cases the communication is volunteered. This fact has no bearing on the question of liability. Some evidence of malice may be drawn from the facts, nothing more.

38. On the other hand, a communication is not necessarily privileged because it is made on request. Should it be unnecessarily defamatory the privilege, if there be one, would be lost. Such a fact would show that the writer or speaker was actuated by malice, and would thus destroy the protection that was available to the party and restore to the plaintiff his right of redress.

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39. Besides cases of self-vindication the subject of prima facie privilege may be summed up in the following general rule: A communication believed to be true and made bona fide upon any subject, in which the party communicating has an interest, or a legal or moral duty to perform, is privileged if made to a person having a corresponding interest or duty, although it contains defamatory matter.

40. Criticism is not defamation unless partaking of a personal character. It is protected, therefore, not because it is privileged, but because it is not defamatory; in other words, is not wrongful.

(*a*) Criticism of works of art, paintings, sculpture, and the like falls within the rule; thus, a person says of a picture placed on exhibition: "It is a mere daub." If this be a fair criticism the sayer is not liable for defamation.

(*b*) The conduct of public men amenable to the public only is a proper matter for public discussion. Bigelow says this "may be made the subject of hostile criticism and animadversion so long as the writer keeps within the bounds of an honest intention to discharge a duty to the public, and does not make the occasion a mere cover for promulgating false and defamatory allegations. The question in such cases, therefore, is whether the author of the statement complained of has transgressed the bounds within which comments upon the character or conduct of public men should be confined; whether, instead of fair comment, the occasion was made the opportunity for gratifying personal vindictiveness and

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hostility, as by making false charges of disgraceful acts. . . . Criticism of public men should be limited to matters touching their qualifications for the performance of duties pertaining to the position which they hold or seek."[1]

41. Another wrong is that of false imprisonment, which consists in imposing by force of threats an unlawful restraint upon a man's freedom of movement. Merely turning one aside, however, from the way he is going does not constitute such an imprisonment.

The justification for false imprisonment is often made out when parties stand in certain relations to each other — as parent to child, guardian to ward, master to apprentice, teacher to pupil. We have already shown elsewhere the rights between these respective parties in this regard.

The charge of false inprisonment when made against a ministerial officer is often met by showing that he was justified by law in doing what he did. In attempting to justify himself in this manner he must show that the process was issued by the court or officer clothed with proper authority, and that in no respect was authority wanting for the course he pursued.

42. Another wrong is a malicious prosecution. This is the instituting of a suit without probable cause therefor, resulting in the acquittal or discharge of the accused. Probable cause involves a consideration of the facts and reasonable deductions from them. The inquiry, therefore, is a mixed one of law and fact.

[1] § 360, p. 181.

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That a party acted on the advice of counsel is always a material fact in his favour, provided the action was taken after a full and fair disclosure of all the facts and the advice of competent counsel.

43. The want of probable cause will not be presumed. This must be shown. The existence of malice is not proof, for this might be the result of the wrong of which complaint is made. An acquittal by a magistrate possessing proper authority is evidence of the want of probable cause, but is not conclusive evidence. If the party prosecuted was convicted in the lower court, but acquitted on appeal, the conviction will be held conclusive of probable cause.

(*a*) The burden of proving that the prosecution was malicious is on the plaintiff. Malice in a legal sense is made out by showing that the prosecution was instituted from any improper or wrongful motive.

(*b*) The prosecution must have come to an end before a suit for its malicious origin can be begun. In general, the acquittal should be final. A discontinuance or a compromise will not suffice, but a dismissal will, even though on technical grounds.

44. Though one has a right to refuse to serve another, he has no right to prevent by compulsion others from employment. A society of men may lawfully unite in agreeing that they will not labour with others who are not associated with them, but they become wrong-doers as soon as they interfere with

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the liberty of others.[1] Consequently, acts done in the pursuance of a conspiracy may be unlawful if they include deception, threats, intimidation or any kind of force, whether employed on the labourer or employer. On the other hand, employers who combine and employ unlawful means to prevent the employment of any class of labourers also violate the liberty common to all.

An act done by one alone is but a civil injury, but it assumes an aggravated character when effected by the powers of combination. An agreement to effect an injury or wrong to another by two or more persons constitutes an offense, because the wrong assumes a formidable character.

"Any man," says Judge Pardee, "(unless under contract, obligation, or employment charging him with a public duty) has a right to refuse to work for or deal with any man, or class of men, as he sees fit: and this right, which one man may exercise singly, any number may agree to exercise jointly." On the other hand employers have a similar right to combine to resist employees. A strike or boycott, therefore, may be a legal movement, if not conflicting with a contract obligation. "We are not prepared," said Justice Harlan, "to hold that a combination among employees, having for its object their orderly withdrawal, in large numbers or in a body, from the service of their employer, on account simply of a reduction in their

[1] Conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful end which is injurious to another. To induce a person by means not lawful to refuse to engage in service is not illegal, but to break up a service actually begun is illegally wrong. A conspiracy to break a contract for the delivery of property is not a legal wrong. See Chap. V., §6.

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wages, is neither illegal nor criminal. But," he added, "a combination of two or more persons with a power to do an injury they would not possess as individuals acting singly, has always been recognised as in itself wrongful and illegal."

Judge Taft in a famous case between two railroad companies said:[1] "Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves, and considered singly, are innocent, when the acts are done with malice, i. e., with the intention to injure another without lawful excuse."

A boycott is an actionable wrong. "Lawful competition in business may damage another without creating a wrong, but trades unions are not ordinarily competitors of the persons against whom a boycott is directed. The purpose of the boycott is, by a combination of many, to cause loss to one person by coercing others, against their will, to suspend or discontinue dealing or patronage because of his refusal to comply with demands of the boycotters. This is a totally different thing from that competition which

[1] 54 Fed., 730.

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is the life of trade." The boycott of a newspaper, therefore, including threatening circulars, designed to stop advertisements and decrease circulation, is an actionable wrong.[1]

45. An agreement among employers in the same line of business to suspend or carry on business, as the majority shall agree, is void, because it is in restraint of trade. This is an ancient principle and is having an unexpected application in these days. As we shall soon see, many of the combinations recently made for uniting business and stifling competition are entirely opposed to this principle. Indeed, it may be questioned whether the violations have not become so general as virtually to make a dead letter of the rule.

[1] Jaggard in his work on Torts contains the following review of cases: In Bohn Manuf'g Co. v. Hillis it was held that a voluntary association of retail dealers could agree not to deal with any manufacturer or wholesale dealer who would sell direct to consumers, and, in accordance with such agreement, notify all members whenever any wholesale dealer or manufacturer made any such sale, without committing an actionable wrong, or creating a basis for the issuance of an injunction. Here the conduct of the retailer's association may have been justified by the exercise of equal rights. It was an effectual check on dangerous competition. Moreover, in this case, as in the cases in which the right of men to quit the employment of their master is recognised, there was simply the exercise jointly of the right any man has to deal with those he chooses, and to quit working whenever he chooses, in the absence of such particular circumstances; as, for example, where there is an attempt to influence the conduct of persons outside of the association. In Delz v. Winfree the court recognised as correct the proposition that a person has an absolute right to refuse to have business relations with any person whomsoever whether the refusal is based upon reason, or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property, but added: "The privilege here asserted must be limited to the individual action of the party who asserts the right. It is not equally true that one person may from such motive influence another person to do the same thing." Accordingly, while it was held that no action for conspiracy would lie for refusal on the part of several dealers in cattle to sell to the complainant (a non-paying customer), yet such action would lie if they induced another dealer, who likewise refused to sell to him. And in Temperton v. Russell it was distinctly held that a combination by two or more persons to induce others not to deal with, or to enter into contract with, a particular individual, is actionable, or done for the purpose of injuring that individual, provided he is thereby injured. The courts, however, regard as actionable wrong any attempt to secure a monopoly of business by coercion or intimidation by combinations. From this point of view, Bohn Manuf'g Co. v. Hillis has been criticised as in conflict with approved authority, and as being bad as a precedent.— Vol I., p. 45. 46.

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46. Lastly, an agreement between labourers whereby they will not seek work at a shop where disputes connected with their trade have arisen, will not encourage or work with a labourer contrary to rules formed by their association, is condemned by the law for the same reason.

47. Religious liberty is guaranteed to every man by the fundamental law. So long as voluntary religious organisations do not interfere with this law they are permitted to have their own way. But when they disregard the fundamental law by expelling their members in an unlawful manner, or by doing things not recognised by the fundamental law, then indeed the law seeks to correct the wrong. Thus, a person who is expelled from a society without proper trial would have a right to complain, and a court of justice would look into the mode of his expulsion and determine whether the proceedings were fair and proper, as quickly as in other cases of a wrong inflicted on a member of a society.

Every person, therefore, is entitled to have his rights tested by the general laws. Thus, Cooley says, the liberty of a pauper cannot be entrusted to the discretion of an officer of the poor or other ministerial or administerial officer.

48. By national and state constitutions all persons are secure against unreasonable searches and seizures of themselves and of their property. The offence is criminal wrongfully to open another's letters, likewise to retain or pry into them. Correspondence by telegraph is in principle surrounded by similar security.

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But persons through whose hands telegrams pass may be compelled to produce them in evidence, and to testify concerning them in courts and before legislative commissioners.

49. Search warrants are issued to discover stolen or smuggled goods, and in a few other cases an officer is justified in searching on private premises.[1] In executing a warrant an officer cannot seize other goods or search other buildings than those described therein, but he is not liable as a trespasser should he unintentionally seize the wrong property which answers the description.

50. An action may be maintained against a person who commits a nuisance. This is a term with a very wide meaning. It has been defined as anything wrongfully done or permitted which injures or annoys another in the enjoyment of his own legal rights. Nuisances that may be the subject of an action will now be described.

51. The right of lateral support by adjoining land is a principle of the common law existing independently of contract. To remove or to weaken such support is a nuisance. A person, therefore, who is improving his own land and making excavations which would endanger the walls of his neighbours must supply supports of some kind; in other words, must keep the walls intact, or be responsible for the injury attending his neglect.

In England the right to lateral support for land weighted with buildings is regarded as an easement. In our country this rule does not prevail.

[1] See § 85 of this chapter.

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52. Sometimes one man owns the surface of the ground and another the subsurface. The law clearly sets forth the rights of both. With no contract between them the owner of the surface is entitled to support for the land itself and the buildings thereon. If the subsurface owner removes the natural support he must substitute something to protect the surface. To work a mine without providing such support is unreasonable and unlawful.

53. Any part of one's building extending over another's line is a nuisance, even though no damage is suffered or anticipated; it is an intrusion, or trespass. Its insignificance simply affects the damage that can be recovered; the nuisance none the less exists.

54. Filthy deposits on one's premises which percolate through the soil, or into a neighbour's cellar, or find their way into wells are a nuisance. The law clearly imposes a duty on everyone to exclude filth of every kind from his neighbour's land; not to do this is negligence. Accidental percolation only would excuse the owner of the premises from which it flows.

A riparian proprietor also commits a nusiance by casting into a stream the refuse of his business, which is carried and deposited on the land of a proprietor below. The wrong in this case consists in putting the rubbish into the stream; the deposit on the land below is only the consequence from which the cause of action of a particular individual arises.

55. The lawful user of water pipes on his premises who injures another by their bursting or leakage is responsible for the consequences. He is especially

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liable should he fail to observe due care in protecting the pipes against these defects.

56. In like manner, while one may lawfully collect water in a reservoir on his premises for useful and ornamental purposes, yet this must be done in proper manner. Should the reservoir through negligent construction break, and injure the surrounding proprietors, the owner would be responsible for the consequences.

One may erect a barrier to prevent surface water from coming on his land without incurring liability to the upper proprietor upon whose land the flow would be increased, or to the lower proprietor by depriving him of the water which otherwise would flow upon his premises.

A different rule applies to a natural watercourse. This must not be stopped and the water turned back on the lands of another proprietor.

Again, one may drain his lands into a natural watercourse, even though a lower proprietor is injured by the increased flow. On the other hand, the lower proprietor can erect any such protection as may be needful to guard his lands against the additional flow, provided it does not interfere with the natural passage of the water.

57. For a watercourse to exist there must be a stream flowing in a particular direction, though it need not flow continuously. It may sometimes be dry. It must flow in a channel having a bed, sides or banks, and usually must discharge in some other stream or body of water.

58. The obligation of the owner of the lower estate

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to receive the water flowing from an upper estate is confined to water which flows naturally, without the art of man, that which comes from springs or from rain. To collect surface water and cast it in a body on the proprietor below, unless into a natural watercourse is a legal injury for which the law gives redress.

59. Municipal corporations are not bound to construct sewers or drains to protect adjoining owners from the flow of surface water; but if they construct them and in such a way as to carry water on adjoining lands, they are liable therefor.

60. A riparian proprietor, as we have seen, acquires no superior right over another by first appropriating the waters to his own use. A different rule applies in some of the mining states. In these the first proprietor may acquire a superior right.

61. As between adjacent proprietors on the opposite sides of a watercourse or between the upper and lower proprietors, no one has a right to the water itself, but each may use it during its passage by his estate. Each may use the entire stream, but neither can carry off nor divert any part without the consent of the other. The use may be for any purpose within reasonable limits.

62. Every proprietor on a watercourse, so runs the general rule, is entitled to the enjoyment and use of a stream substantially in its natural flow, subject only to its diminution caused by the reasonable and proper use of other proprietors.

63. What is a proper use depends on the nature and size of the stream and the business or purpose it

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serves. Moreover, the general customs of the country, and the legal customs along the stream, must be considered. Such general rules prevail as appear best calculated to secure the entire water of the stream to useful purposes.

Whether the use of a stream to carry off waste from a manufactory is reasonable or not is a question of fact to be determined in each particular case. Many of the streams in our country would be of little use if mills could not be erected by them and their waste water discharged into them. In doing this the water to some extent is corrupted, and then the question arises — how far can a proprietor go in thus using a stream? He may to some extent change the natural condition of the water without legal wrong. Says Chief Justice Redfield, in a modern case: A deposit which might be of no account in some streams might injuriously affect the usefulness of others. So, too, a kind of deposit which would affect one stream seriously would be of little importance to another. There is no doubt one must be allowed to use a stream in such a way as to make it useful to himself, even though it does produce a slight interference to those below.

Though each proprietor is entitled to a steady flow of the stream, yet it is lawful to gather the waters into a reservoir for a useful purpose, interfering as little as possible with the rights of other proprietors. An eminent writer has said that while the lower proprietor is entitled to the use of the stream in undiminished volume, yet one above him may lawfully withdraw therefrom whatever may be necessary to supply

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the wants of his family or of his domestic animals, and also for irrigation, manufacturing and other useful purposes, provided that such withdrawal does not essentially diminish the volume to the prejudice of those below.

64. What is a reasonable retention of water? If a natural stream during the dry season is permitted to flow without any hindrance, a manufacturer may be unable to obtain a supply sufficient to serve his purpose. The only effective way to use the stream is by impounding until a supply has been gathered of sufficient force to turn his wheel. This often results in cutting off, it may be for several hours or longer, the entire flow of the stream from those below. Whether this can be done at all or not depends on the character of the stream and the general purpose for which it is used.

65. No owner has a right by dam or otherwise to cause the water of a stream to set back on the lands of an upper proprietor. This is an actionable wrong. On proof of raising the water the damage will be presumed.

66. Let us pass from water to fire. Possessing a dangerous nature, it must be used in a reasonable manner. The time may be suitable and the manner prudent, yet if one be guilty of negligence in taking care of fire, and it spreads and injures the property of another, he is liable in damages for the injury.

As fire is a needful agent in life negligence is not necessarily to be inferred in using it, but this may be so. Negligence is a relative term and denotes the

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degree of caution which would be exercised by a person of ordinary prudence under the peculiar circumstances of each case. Negligently guarding or leaving a fire is a wrong for which the wrongdoer is liable. Protected by legal authority one may cause damage by fire without liability; it would be the incident of an authorised act. Thus if sparks from a passing locomotive set fire to a hay stack, the railway company is not responsible if it has taken reasonable care in constructing and using its engines.[1]

A spontaneous combustion may be a negligent fire. It is immaterial whether the fire spreads by running along the ground or by sparks carried by the air or wind.

The starting of fires is sometimes prohibited because of the dangerous consequences. Whoever sets a fire within the prohibition must suffer should any injury follow.

No action arises from fires kindled by sparks from machinery lawfully used, like a locomotive, unless negligence can be shown in the selection, adaptation or use of the machinery. A case of negligence could be made, for example, by showing a failure or neglect to make use of approved appliances for arresting sparks.

A railroad company is negligent in leaving combustibles along the track where they are liable to take fire from falling sparks, but a man who leaves combustibles on a road near a railroad is not guilty of contributory negligence, because the law does not cast on him the

[1] See Vol. II., § 8, p. 331.

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same rule respecting care to prevent fires as on the railroad.

67. The owner or keeper of an explosive may be liable for an injury caused by it. The most watchful care and active diligence must be used in keeping it. In applying this principle to a carrier in a nitroglycerine case, the highest court has held that it is not the carrier's duty to know the contents of every package offered for transport, and when there are no attendant circumstances awakening his suspicions concerning its character there is no legal presumption that he had such knowledge in any particular case. When ignorant, therefore, of the contents of a package through no fault of the carrier, he is not guilty of negligence in introducing it into his place of business and handling it in the same manner as other packages of similar outward appearance are usually handled. "With respect to gas," says Jaggard:[1] "while its manufacture may produce damages recoverable as a nuisance without proof of negligence, the tendency of the courts is to base responsibility for damages consequent upon its accumulation. The test is whether the manufacturers omitted to do something which in the exercise of ordinary care and skill they ought to have done, or whether they did any act dangerous in itself, or under circumstances in which it was not consistent with ordinary care and prudence that it should be done. It is the duty of the person who conducts it through pipes to exercise every reasonable precaution suggested by experience and the known dangers of the substance."

[1] Vol. 2, p. 848.

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"This would require," says the Supreme Court of Pennsylvania, "in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to prevent the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business." [1]

The explosion of a boiler, purchased of a reputable manufacturer, from an unknown latent defect does not render the owner liable. The accident is not proof of negligence. "The explosion of fireworks," says Jaggard, [2] "in the streets of a city has been regarded as a public nuisance rendering all persons concerned in doing the act or causing it to be done liable for all damages proximately resulting therefrom. The discharge of fireworks at suitable places, however, when not prohibited by statute or municipal regulation, cannot be said to be unlawful, and the burden is on the plaintiff to show such circumstances as will make it culpable negligence. Even where the display is in a public highway, the better opinion seems to be that a voluntary spectator assumes the risk of danger."

68. One who uses loaded weapons is responsible only as he might be for handling in a negligent manner any dangerous machine. In other words,

[1] Koelsch v. Philadelphia Co., 152 Pa., 355.
[2] Vol. 2, p. 851.

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his care must be proportionate to the danger of the injury.

The firing of guns for sport or exercise is not unlawful when this is done in a fit place, but in the streets of a city or where many people are gathered together this would be negligence. Were a loaded gun put in the hands of a young child this would be negligence, and the person doing this, should an injury happen, would be responsible.

69. In like manner should one deliver to a carrier explosive articles for transportation without telling him what they were would be responsible were parties injured. So would one be who should put articles in a trade for use that would be dangerous, or who should sell poisonous drugs with a wrong label, or who should label them as harmless.

70. Another nuisance that may be mentioned is an offensive noise. An ill-natured dyspeptic dog that disturbs the community at night by incessant barking may be a nuisance. Likewise, the noise in a billiard-room or place of drinking or carousing; disorderly houses of all kinds, are nuisances; a livery stable also may be kept in such a manner as to fall within this limitation. Manufacturing operations also, especially in a part of the city where people reside, may be a nuisance. The smoke and dust that arise from a man's premises may pollute the air and become a nuisance. In short, most of us are too familiar with inconveniences and evils of this sort to require a further description of them. The rule of law in all of these cases is very plain; no one has a right to conduct

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his business or place of amusement of any kind in a way that will materially interfere with the ordinary comfort, physically, of human existence.

71. Offensive odours may proceed from a business conducted in an improper place, or be managed improperly. When the business itself is lawful and proper the suitableness of the place of activity becomes a question. The law presumes that a necessary or useful business is not a nuisance; however ancient, useful or necessary the business may be, if it is so managed as to occasion serious annoyance, injury or inconvenience, the injured party has a remedy.

The business of tanning leather is often found to be a nuisance, because of the offensive smells proceeding therefrom, and in particular from the fouling of streams near which the business is usually situated. In like manner a livery stable or a brewery may be offensive by improper or negligent management.

72. "Adulteration is the act of corrupting or debasing; the act of mixing something impure or spurious with something pure or genuine, or an inferior article with a superior one of the same kind.[1] To sell unwholesome provisions or mix poisonous ingredients in food or drink is an indictable common law offense, whatever the motive may have been. Within recent years many states have re-enacted their statutes on this subject; Congress also has enacted a law. Statutes against adulteration of milk have been more frequently passed than on any other thing. Water may be used as an adulterant. In some states the

[1] Words and Phrases, p. 210.

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laws permit the use of adulterants that are harmless with notice on the articles adulterated of the nature of the composition.

To convict it is not always needful to prove that the seller had knowledge of the adulteration; proof of sale will suffice; by some statutes, however, proof of knowledge must be shown.[1] The act of a servant also is the act of the master in selling whenever he is acting within the scope of his employment; by some statutes the servant, too, may be guilty of the offence.[2]

As all penal statutes are strictly construed, so must their provisions be carefully regarded in order to obtain a conviction under them. Thus in statutes relating to the preparation of samples for analysis the directions must be strictly followed. If the law required a bottle to be sealed, for example, the wax must be so applied as to render the bottle air-tight.[3]

On some occasions persons have been held liable for damages caused by poisonous or offensive substances in their use, ownership, or custody. Thus the owner of yew trees, permitted the branches to overhang another's meadow. Horses that were rightfully pastured there died as a consequence of eating the branches. The owner of the trees was held liable. Likewise the owner of a cow that died from eating pieces of a wire fence that decayed and fell into his pasture was entitled to damages from the fence owner. A landlord has been held liable for letting premises that he knew were infected. A manufacturer of and

[1] Commonwealth v. Flannelly, 15 Gray, 195.
[2] Meyer v. State, 54 Ohio St., 242.
[3] Commonwealth v. Lockhardt, 144 Mass., 138.

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dealer in vegetable medical extracts was held liable for labelling and selling an extract of belladonna, which was a poison, as an extract of dandelion, a harmless medicine, from the use of which the purchaser was seriously injured. Says Jaggard:[1] "Poisons, spoiled food, or materials otherwise mischievous or dangerous which do no damage to innocent third persons, attach liability to the vendor or manufacturer only when he has been guilty of negligence. His duty is not ordinarily absolute, but he must exercise a very high degree of care. He is not liable for latent defects in things sold — for example, machinery — but he is liable for obvious defects." "The rule, however, is limited," says Judge Jenkins, "and justly so, to instrumentalities and articles in their nature calculated to do injury, such as are essentially and in their elements instruments of danger, and to acts that are ordinarily dangerous to life and property."[2]

73. Mental disquietude which is caused by conduct of people or associations over their religions may be put under this head. Judge Cooley says any public evil or disorder which by statute is declared to be a nuisance must be held and deemed to be one. There may be many other statutory nuisances which cannot afford grounds for private action for the reason that the only annoyance they could cause to individuals would be such as might be caused by any breach of public order or good morals.

74. One is under no obligation to keep his premises

[1] Vol. II, p. 907.
[2] Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A., 253.

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in a safe condition for the visits of trespassers, but if he invites persons to come on them for any purpose they must be reasonably safe.[1] Thus, a railway station must be reasonably safe for passengers; therefore, should a platform be defective and give way and one of them be injured, the company would be liable.

75. One who exposes a machine on a market day is not responsible for injuries to boys who meddle with it without permission. Liability must have its origin in negligence, and an owner is not negligent in those cases wherein he is under no duty with respect to the care or mode of keeping his machine.

76. For the same reason one who is walking about a wharf, and seeing a vessel, should be led by curiosity to go on board without permission, would be a trespasser; and if he were injured by falling down the hatchway he could simply blame himself for his folly in going where he had no right to go, notwithstanding the temptation before him.

Though a person has violated the law this may not prevent him from recovering for a subsequent wrong done to him, but he does not stand on the same footing as an innocent person. Thus a trespasser, intruder, or volunteer, on the premises of another cannot recover under circumstances which would entitle a person lawfully there to maintain an action for injury he had sustained. "Therefore," says Jaggard, "if a trespassing person of full age, a child, or an animal runs into a barrier, excavation, or other source of danger,

[1] See § 85 of this chapter.

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there is no actionable wrong. The owner of the premises is not bound to provide safeguards."

On the other hand, though a man may be a trespasser, this does not justify in recklessly or wantonly injuring him. Thus, if one's horses run at large in violation of a city ordinance and stray on a railroad track, the owner cannot recover for an injury done to them by a passing train, but if the injury was caused by the reckless and wanton misconduct of the company's servants while they were there then he could recover.

77. Many things which threaten calamity to the persons or property of others are a nuisance. The blasting of rocks near one's dwelling is of this nature. Likewise powder or any other dangerous explosive stored and imperfectly guarded near another's residence. Likewise a building constructed in a faulty manner or greatly decayed and likely to fall and injure the persons or the property adjoining. In such cases the party injured or endangered need not wait for the calamity to happen before proceeding to abate the nuisance.

Any one who puts a heavy substance in such a position that it is likely to fall and injure persons or property is liable without further proof of negligence. Thus an employee while repairing a building who let a chisel fall, which struck a person working on the sidewalk, was guilty of negligence. If, however, things fall into the interior of a building, the same rule of protection does not apply to persons who may be below, if their presence was not expected. One who

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maintains a heavy sign over a sidewalk in a frequented part of the city is presumptively negligent if it falls and injures an individual who walks under it. If a roof is so constructed that water, snow and ice will collect thereon in the ordinary course of things and fall on an adjoining highway, or on a neighbour's land, the owner of the building is liable for the resulting loss. Says Jaggard: [1] "It would not avail the owner to say that he did all he could to prevent the consequences. He had no right to build it in that way. His act was an attempt to extend his right as proprietor beyond the limits of his own property, at the expense of the travelling public. He was bound, at his peril, to keep the ice and snow that collected on the roof within his own limits; and, if the shape of his roof was such as necessarily and naturally threw it upon the street, he was responsible for all damages, precisely as if he had, under the same circumstances, thrown it upon the premises of the adjacent owner."

The owner of a building, wall, elevated road, lumber pile, or any other structure must take reasonable care to keep it in a proper condition, and if he should neglect to do this and it should fall into a street or other public place and injure a person who is lawfully there, he would be negligent. When part of a building falls without any apparent reason, the owner is not relieved from liability to persons not in his employ, though he may have used care in making his plan, and selected a competent architect and contractor. In the case of a chimney the court said it was an absolute duty for

[1] Vol 2, p. 838.

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the owners to have exercised proper care to prevent its fall.[1]

78. In the use of electricity the wrongs done by machinery poles and wires may be regarded either as a nuisance, trespass, or negligence. One who owns, uses or controls, such appliances is held to a degree of care corresponding with the use of similar appliances for other purposes. The use of an electrical current, therefore, is proportioned to the danger. A live wire is exceedingly dangerous. Consequently when one has proved contact therewith and injury, the burden of proof is on the owner to show that the wire was in the street without fault on his part. "Generally, companies using electricity on lines along a street are charged with the highest degree of care, having due reference to existing knowledge in the construction, inspection and repair of their wires and poles, and in the use of devices to guard against harm."

79. When harm is done by the use of an innocent thing the owner's liability "naturally depends upon the exercise of care proportioned to probable harm." Thus a rope dragged behind a moving vehicle, a board thrown back from a circular saw, a hammer in use, a beer barrel swung from a wagon when suddenly turning a corner, may be the cause of liability if negligently controlled. Likewise a bicycle rider while entitled to equal rights of the road with the owner of a carriage, is liable if he goes at such a rate of speed as to frighten horses.

80. The liability of the owners of animals for in-

[1] Jaggard, Vol. 2, p. 839, 840.

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juries done by them has been elsewhere considered, yet some additional principles may be properly stated here. There is a wide distinction between his liability for an animal which breaks away from the tameness of its nature and becomes fierce, and for an animal which is wild by nature. He is not liable for negligent failure to keep a domestic animal not known to be vicious, confined to his premises, except for consequences which might have been anticipated from its well-known disposition. Thus the propensity of such an animal is to stray away, consequently he is liable for the consequences of the animal's straying. On the other hand, if while driving cattle through the street they stray and do injury, he is not liable unless he has been less careful than a prudent man would have been to prevent them from doing harm. Says Jaggard: "In the absence of knowledge of vicious propensities, the owner is liable only for damage caused by the natural propensity of the animal, and this is to be determined by a consideration of normal disposition. Thus, while it is natural for horses to kick each other, it is not their ordinary nature to kick human beings. Hence, where a horse strayed on a highway, and kicked a child, the owner was not held liable, in the absence of knowledge of the horse's vicious temper; but if, although not vicious, it has kicked another animal, he has been held liable. If a dog be of a savage disposition, and accustomed to bite, the owner or keeper is liable only if he knows these facts; but if the owner is aware of such viciousness and permits the dog to run at large, he is liable, without proof of negligence,

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for its indulgence in the propensity to bite. The liability is the same if one be bitten while lawfully on the premises of the dog's owner." Likewise if an animal is suffering from a contagious disease, which may affect other animals, its owner or keeper is liable for allowing it to escape, whenever he knew, or ought to have known, of its diseased condition.[1]

The owner of a monkey who knew of its mischievous and ferocious nature, was liable to a woman who was bitten by the animal. Said the court: "Though the owner have no particular notice that it did any such thing before, yet if it be a beast that is wild by nature as a lion, a bear, a wolf, yea, an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage."[2] The tameness of the animal may lessen the damage[3] the owner may be obliged to pay the injured person.

81. Objects in a highway, though not preventing passage, but rendering it dangerous from a tendency to frighten horses, are nuisances. But when the thing is an instrument to facilitate traffic the question whether it is a nuisance cannot be determined by the single fact of its tendency to frighten horses even of ordinary gentleness.

82. Street railways and elevated roads using steam power are not nuisances, but if an injury occurs from their use the question may arise whether a fault may be imputed to some one in the mode of using them; if so, who should be held accountable therefor.

[1] 2 Jaggard, p. 857.
[2] 1 Hale Pleas of the Crown, p. 430.
[3] 2 Jaggard, p. 854.

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83. Without attempting to describe the nuisances of municipal corporations fully, it may be said that many of their works are of this nature. Public highways are for the use of all people of the state, and the municipalities keep them in repair. By statute in many states, therefore, they are rendered liable for defects in them, including also the sidewalks.

84. In some states a husband, wife, parent, child or guardian can maintain an action against parties for selling intoxicating liquors to a member of the family. The recovery may extend to injuries relating to the means of support, the expense of caring for the intoxicated person, and other injuries and losses described by the statute. These provisions are for the benefit and protection of the family and are construed with considerable strictness. Thus, a wife who brings an action for the intoxication of her husband can recover only for the injury to him or to her property or means of support and not for anguish of mind, mortification, or loss of her husband's society. Exemplary damages can be recovered only when, beside actual damages, aggravating circumstances are shown. It is no defense that others may have sold liquors to a husband, but when several are liable there can be but one recovery to the injury. Lastly, whether the sale was made by the accused in person or by a servant is immaterial.

85. Coming to the subject of property, the law often implies a license to enter the premises of another. A person may visit another's place of business from no other motive than curiosity without incurring any

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liability unless he is warned away. Nevertheless the invitation implied by the law is limited by the nature of one's business. Thus, a person would be guilty of trespass if, instead of visiting a dealer's shop for the purpose of purchasing something he had to sell, he should assemble his associates there for a political purpose. Every man, so the law implies, invites another to come to his house as he may have proper occasion, either for business, friendship or employment. Custom determines what is the limit of this implied invitation. When persons are young, or lacking in intelligence, an implied license exists which does not with persons older or more intelligent.

Again, an implied license exists under several other conditions. Thus, in case of fire, a man has permission to enter on the land of another. The owner of a lot cannot exclude those who would use his premises as a proper place for stopping a conflagration, and if it is necessary to destroy buildings the sufferer must seek redress from the city or state and accept the public award.

Another illustration may be given of a highway that is out of repair or obstructed. A traveller who has occasion to use it may lawfully pass on the adjoining premises, carefully avoiding any unnecessary injury. Of course, if there was another way of reaching his destination, which could be taken without too much loss of time or inconvenience, doubtless it would be his duty to take this rather than pass over the land of an individual.

Another instance of a license may be given of an

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officer who in serving a process must enter private grounds or buildings. Generally speaking, an officer may go wherever a man is to serve a process on him, but the law recognises every man's house as his castle. He can therefore close and defend it against a private person, and even against officers of the law. But this privilege applies only to the outer walls. If a door is found open the officer may enter for any lawful purpose and, having entered, may break open the inner door to complete his service.

Of course there are cases in which the castle doctrine does not apply. Thus, the outer door may be forced open to arrest a person who is charged with treason, felony, or breach of the peace. An officer may do this in serving a search warrant describing the building which is to be entered.

The building must be the man's habitation, though it may be a part of his house only. Thus, one building may be occupied by many persons which open into the common hall.

Lastly may be mentioned the case of a license granted by law to enter and abate a nuisance, of which more will be said elsewhere.

86. A license given by the owner, or by the law, may be lost by abusing it. An abuse not only terminates, but revokes a license. The law presumes from the misbehaviour of a licensee that he entered originally with the purpose of doing wrong, of which he is guilty and is held as a trespasser from the beginning. Thus, if persons enter a public inn and demand entertainment, the landlord is obliged to receive them; if they abuse the

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license by riotous conduct they become trespassers, which relates back to the beginning of their entry. In such cases the law wholly withdraws the authority.

87. The entry of a landlord when his tenant is in rightful possession is a trespass, but he may enter after the tenancy expired. In some cases, while he cannot employ force to expel the tenant, he can treat as trespassers all other persons who may be there without authority, or who afterward enter into possession.

88. The possession of one tenant in common is in law the possession of both. Therefore one who enters is presumed to do so in the right of both. One tenant, though, may expel or exclude the other, but, if the ousted tenant can recover possession, he can maintain trespass for the profits during his wrongful dispossession against the other.

89. The owner of lands, who seeing individuals in his fields, in pursuit of game, does not forbid them, waives his right to complain of their wrong-doing. Again, a hunter with dogs which worry the domestic animals of the owner or do him other damage, is a trespasser and responsible, even though he be innocent of the vicious propensities of his dogs. The reason for this rule is, he has committed a trespass in entering, and therefore the mischief done by his dogs is an aggravation.

90. The right to take fish in fresh-water streams belongs solely to the owners of the land beneath. The public has no right therein. In many states there are statutes regulating the rights of riparian proprietors, and also the rights of persons to fish in streams and

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other waters. In Massachusetts and some other states towns are allowed to exercise this power for the common benefit of the people and to sell or lease rights of fishery in waters which at common law belong in a certain sense to the public, although the rights of the owners to the banks are conclusive.

The rule concerning fresh-water streams applies to the smaller lakes or ponds, but not to the larger ones.

In tide waters the right to take fish belongs to the public. This right is always subject to the public right of regulating them for the benefit of navigation. Those engaged in navigating tide waters, however, will be liable for negligent injury caused by their vessels to seines, oyster beds, etc.

To take fish in private waters, where the public is accustomed to go, is not a trespass until in some manner the owner has objected to their going.

91. To throw objects on the land of another, or to cut trees so that they will fall on another's lands is wrongful. It is a trespass in blasting rocks to throw fragments on another's property. Furthermore, though a party may not be guilty of any negligence, this is not a defense.

92. The true rule of judging an injury as an alleged nuisance is declared to be the natural and necessary result to all alike who come within its influence. An act would not be a nuisance to one on account of peculiar sentiments, feelings or tastes, if it would have no effect on another, or all others without these peculiar sentiments or tastes; nor to a sectarian if it would not be to one belonging to no church. "It

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must be something about the effects of which all agree." Such was the deliverance of the Supreme Court of Pennsylvania in reply to a complainant who sought to abolish travelling on the street railway on Sunday.[1]

93. To create a nuisance someone must be at fault. If one is not, though others may suffer by his conduct, no nuisance exists in the legal meaning of the term. For example, swamps and marshes may prove injurious to the health of those living near them, but they are not nuisances in their natural state. But the moment the owner does anything which increases their deleterious effect, or renders his land offensive in a new and different way, he becomes responsible.

94. A party is responsible for a nuisance because he purposely creates or continues it. Distinct parties may be equally liable, one perhaps for the wrong in creating, and the other in failing to abate.

95. To have an action an individual must suffer a direct injury different from that suffered by the community. To entitle him to recover he must show that he has been injured by the nuisance, and distinguish his injury from that suffered by the public. Thus, one who lives on a navigable stream which he uses, who should find a barge so moored that his own boat could not pass, would suffer from a special injury and be entitled to redress.

On one occasion a person complained of coal sheds erected by a railroad company, and was successful in sustaining an action for damages resulting from the

[1] Sparhawk v. Union Pass. R. Co., 54 Pa., 427.

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coal dust which entered his house and fell on his food, clothing and furniture.

96. A nuisance continued is a fresh nuisance every day so long as it remains unabated, and a new action caused by its continuance may be brought from day to day.

97. Sometimes a person is permitted to redress his wrongs without appealing to the law. Thus, a person who is injured by a nuisance may, perhaps, by his own will proceed to abate or remove it. The blocking of a highway is a public nuisance and one who has occasion to use it need not wait for public action. He may proceed himself to remove the nuisance, and thus be permitted to go on his way. But should he seek compensation for a personal wrong he must resort to law.

98. In thus seeking to redress wrongs inflicted on them they must not be guilty of a breach of public peace. In abating a nuisance by destroying property one must not go beyond the limits of necessity. A building, therefore, that is improperly occupied causing a nuisance should not be destroyed, but the occupiers who are the cause of the nuisance should be removed. To this extent a person may go, within the pale of the law, but no further.

99. Self-defense includes acts done to preserve the lives and security of others who stand related to the accused, as a husband or wife, parent or child, guardian or ward, master or servant. In such cases the defense must be limited to necessity, and to the defense of property.

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100. One who is deprived of the custody of a person may recapture him if entitled to the legal custody, but in so doing must observe the principle above mentioned of not causing a breach of the public peace. If a wrongdoer takes the property of another and mixes it with his own, so that separation is impracticable, the owner may take the whole or abandon his own and sue for the value. An eminent writer, though, says that this forfeiture of property by a wrongdoer will not be recognised if what is thus commingled is so far of the same general nature that justice can be done by dividing it between the parties according to their respective proportions.

101. The owner of property wrongfully taken from him and converted into something of greater value, if able to distinguish his own, can retake it, notwithstanding its greater worth. If the taking was by mistake or in good faith, or cannot be recovered without causing injury beyond its value, the owner will be left to his action for damages. An illustration of this principle may be given of the taking of a few boards or stones and building them into a house; surely the rightful owner would have no right to pull down the house for the sake of getting his material, or of taking the house in order to repossess himself of his own.

In applying this principle the true owner of real estate can re-enter and exclude the wrongful possessors whenever he can do so in a peaceable manner.

102. A party may distrain domestic animals that have strayed on his lands in order to obtain redress; they

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must, though, be actually trespassing. The right to impound them is now generally regulated by statute, and wherever it exists the remedy prescribed must be followed.

103. Sometimes damage results from pure accident, and without the fault of anyone. In such cases, though great harm may be done, no action will lie. Thus, a person in excavating on his own land may draw the subterraneous waters from the land of his neighbour, who is thereby injured; nevertheless, no action will lie for damages; it is one of the few injuries sustained by man as a creature of society without a remedy.

104. Wrongs may be ratified by others who, in that way, become participants and liable. The ratification must be made with full knowledge of the facts. It is not sufficient that a party receives and appropriates the benefit for what is done, or takes steps in defense of the wrongdoer, for these are actions that may be done out of friendship. If the wrongdoer is an agent of or servant to the wrongdoer, ratification may be established on higher evidence than in other cases.

105. When a wrong was intended the parties are supposed to intend the consequences. Each, therefore, must assume the responsibility for the misconduct of all. The person wronged may treat all as one party, and if he proceeds against them jointly is not required to show how much of an injury is attributable to one and how much to another. The injured party may, if he please, proceed against any one or more of the parties responsible, regardless of the participation of the others, for the wrong-doing of one is not

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lessened by the assistance or encouragement of another.

106. A sheriff or other officer acting by deputy is a participant in what is done by the deputy, for in law he is always regarded as present and directing the action.

107. The party who decides to proceed against one or more of the wrong doers does not, by beginning his suit, release his claim against the others; he may sue them afterward. Neither is the recovery of a judgment a bar to suits against the others, but as the injury is joint a recovery against one for all the damages supposed to have been sustained operates as a complete bar against obtaining judgment and damages against the others. When, therefore, several suits are brought and judgments obtained thereon, a levy may be made on one and another until obtaining complete satisfaction.

108. One who owns and operates an elevator, either himself or by his agent, must at all times use reasonable care to make it safe for all who have any right to use it. Again, the owner of an elevator that remains under his control is liable to his tenants for any defect therein, or in its management, which can be prevented by reasonable care and vigilance. Finally, the passageway to an elevator should be properly protected. This duty is so imperative that anyone who sees the door open at a landing is justified in supposing the elevator is there ready to raise or lower him. If, therefore, the entrance is left open and one enters and falls, and is thereby injured, the owner of the elevator is liable.[1]

[1] People's Bank v. Morgolotski, 75 Md., 403.

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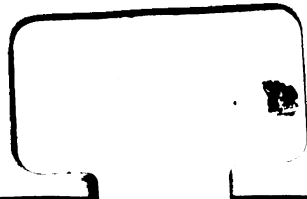

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